United States Court of Appeals
for the
District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX - VOL. III

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAR 14 1960
Joseph W. Stewart
CLERK

257

No. 15,414

UNITED AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

No. 15,415

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

PETITION FOR REVIEW OF ORDER OF THE
CIVIL AERONAUTICS BOARD

Pages 771 through 1012
Containing Excerpts from Record Pages 4471 thru 5186
And Court Of Appeals Pleadings

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Washington, D. C. ROBERT L. THIEL EX 3-0695

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[4471]

CIVIL AERONAUTICS BOARD
Washington 25, D.C.

April 17, 1959

Mr. Floyd M. Rett
Attorney for
United Air Lines, Inc.
Mayer, Friedlich, Spiess,
Tierney, Brown & Platt
231 South LaSalle Street
Chicago 4, Illinois

Dear Mr. Rett:

Oral Argument -- 4/29/59
Re: New York-San Francisco Nonstop
Service Case, Docket 9214

Consideration has been given to your request of April 15 that the time allotted to United Air Lines in the above-entitled proceeding be increased to 45 minutes. I regret that it will not be possible to grant the increase in time which you have requested.

Very truly yours,
/s/ Francis W. Brown
Chief Examiner

Copy to all parties.

[4488]

* * * * * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

April 24, 1959

Honorable Eugene J. Keogh
House of Representatives
Washington 25, D. C.

Dear Gene:

This will acknowledge receipt of your memorandum of April 23, 1959, regarding the hearing to be held on April 29, 1959, by the Civil Aeronautics Board on the question of certifying a third non-stop carrier between New York and San Francisco.

I very definitely agree that a third carrier is needed, and I hereby authorize you to indicate to the Board that I am in accord with your thinking on the matter.

With kind regards, I remain

Sincerely yours,
(Initialed)
ALBERT H. BOSCH, M. C.

AHB:LWS

[4489]

* * * * * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D. C.

April 28, 1959

James R. Durfee, Chairman
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Durfee:

It is my understanding that the Civil Aeronautics Board will hear oral argument on April 29, 1959 on the question of the need for a third nonstop carrier in the New York/Newark-San Francisco/Oakland market. I am therefore submitting this letter to the Board under the provisions of Rule 14 of the Rules of Practice and request that it be read into the record at the oral argument.

This market is the second most important passenger-mile market in the nation; yet it is without three nonstop carriers. The inadequate and inferior service presently existing has not only caused inconvenience to the general public, but has resulted in economic loss to business enterprises which have need for additional nonstop facilities.

The New York Port Authority has strongly expressed support for a third nonstop carrier as have the cities of San Francisco and Oakland.

Because of New York's increasing importance as a connecting point as more jet planes come into service it becomes apparent that additional service in the area is essential.

In view of the above, I urge upon the Board favorable consideration of the institution of a third nonstop carrier.

With kind regards, I am

Sincerely yours,

/s/ Leonard Farbstein
LEONARD FARBSTEIN
MEMBER OF CONGRESS

[4490]

* * * * * *

HOUSE OF REPRESENTATIVES, U. S.
COMMITTEE ON THE JUDICIARY
WASHINGTON, D. C.

April 27, 1959

Honorable Eugene J. Keogh
House of Representatives

Dear Gene:

It is perfectly agreeable that you appear before the Civil Aeronautics Board and cite me in support of a third non-stop carrier between New York and San Francisco. I do this in support of increased competition.

With all good wishes, I am

Sincerely yours,

/s/ Manning
EMANUEL CELLER
Chairman

EC:da

[4491]

* * *

* * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D. C.

April 24, 1959

Honorable James R. Durfee
Chairman
CIVIL AERONAUTICS BOARD
Washington, D. C.

Re: D. N. 9214 ✓ et al - New York/Newark - San Francisco/Oakland Nonstop case.

Dear Chairman Durfee:

I am addressing you and other Members of the Civil Aeronautics Board with regard to the forthcoming Oral Argument before the Board on the certification of a third nonstop carrier from New York to San Francisco.

I think we are all aware of the need for such an additional nonstop airline. This is a matter of vital interest not only to me and other residents of New York, but to the many millions of people who come to New York yearly.

As you know, New York is the greatest business center in the world. As such, the transportation facilities are most important. In my opinion, the airline facilities in the New York area have not measured up to the standard to be expected. When one stops to consider the fact that New York-San Francisco is the second most important passenger-mile market in the Nation, I believe that you will appreciate the necessity for having additional nonstop New York-San Francisco facilities. Present services are not adequate and for that reason I urge the authorization of a third such carrier.

I submit this letter to you under the provisions of Rule 14 of the Board's Rules of Practice, and would like it to be read into the record at the Oral Argument.

Very sincerely yours,

/s/ James C. Healey

James C. Healey
Member of Congress

JCH:fp

CC: Honorable Chan Gurney
Honorable G. Joseph Minetti
Honorable Louis J. Hector
Honorable Harmar D. Denny

[4501]

[Received April 30, 1959, CAB]

CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

In the Matter of:

NEW YORK-SAN FRANCISCO NONSTOP SERVICE CASE

Docket No. 9214, et al

EXCERPTS FROM
ORAL ARGUMENT

* * * * *

Date - April 29, 1959

* * * * *

[4502]

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[4504]

* * * * *

Room 1027 Universal Building,
Washington, D. C.
April 29, 1959

The above-entitled matter came on for oral argument pursuant to notice at 10 o'clock a. m.

PRESENT:

JAMES R. DURFEE, Chairman
CHAN GURNEY, Vice Chairman
HARMAR D. DENNY, Member,
G. JOSEPH MINETTI, Member.

* * * * *

[4506]

PROCEEDINGS

Chairman Durfee: The Board will now hear oral argument in the New York-San Francisco Nonstop Service Case, Docket No. 9214 et al.

The order of appearances and time allotments are as shown on the mimeographed list which has been distributed.

If you have not already done so, please enter your appearances with the official reporter during the first recess.

There are number of Members of Congress present who desire to make statements and they will be heard at the opening of this argument.

Senators Engle and Kuchel of California and Representative John E. Moss of California have submitted written statements of their position with respect to the issues in this case and these statements are included in the docket.

Congressman Victor L. Anfuso, New York and Frank Osmers New Jersey, have also submitted written statements which are included in the docket.

* * * * *

[4511]

STATEMENT OF THE HONORABLE EUGENE J. KEOGH REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK.

Mr. Keogh:

* * * * *

[4512]

* * * * *

Representative Leonard Farbstein of New York, Representative James Healey of New York and I have been authorized to submit for the record these two letters, one from Representative Emanuel Celler of New York and one from Albert Bosch.

You have previously received the statement from Representative Victor Anfuso, and I am authorized to say to you on behalf of the following representatives from the City of New York that they join in the views that I present to you today:

Representatives Halpern, Holtzman, Kelly, Santangelo, Multer, Ray, Powell, Teller, Buckley, Fino, Delaney, Lindsay and Selengo.

* * * * *

[4523]

STATEMENT OF J. ARTHUR YOUNGER REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA.

Mr. Younger:

* * * * *

[4524]

Since May, 1957 I have aided in the efforts of San Francisco to obtain a third nonstop carrier to New York.

* * * * *

[4529]

Chairman Durfee. Congressman Dorn, I want to assure you that in so far as the presence of members of Congress is concerned, the Board has always welcomed this representation of this kind as being representative, truly representative of the expressed will of the people from

[4530]

the constituencies they represent. We are very glad to have all of the members of Congress that are here today.

* * * * *

[4535]

STATEMENT OF THE HONORABLE HAROLD T. JOHNSON REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA.

Mr. Johnson: Mr. Chairman and Members of the Board, I am Representative Harold T. (Biss) Johnson of the Second District of California, representing 19 counties from the Oregon line to Death Valley on the East side of California.

* * * * *

[4536]

I have with me here a Resolution that was recently adopted by both Houses of the State Legislature in California,

[4537]

known as Assembly Joint Resolution No. 27. It was passed by a unanimous vote I do believe in both Houses, and I would like to read it into the record:

"Whereas, In a few weeks the Civil Aeronautics Board will conduct a hearing to evaluate the evidence concerning the application of a transcontinental air carrier to begin nonstop jet airliner flights between New York and San Francisco; and

"Whereas, Nonstop service between New York and San Francisco is now provided by two commercial airlines flying piston-type aircraft; however, this existing service does not meet adequately the growing needs of this area, and the addition of jet airliner service would reduce the time in air travel between these two great metropolitan communities by approximately 50 percent; and

"Whereas, the need for nonstop service by jet air travel is extremely critical and important to the entire Northern and Central California areas; now, therefore, be it

"Resolved by the Assembly and the Senate of the State of California, jointly, That the Members of this Legislature respectfully urge the Civil Aeronautics Board to rule in favor of establishing a third non-stop air service between San Francisco and New York, which will allow the immediate scheduling of jet airliner flights; and be it further

[4538]

"Resolved, That the Chief Clerk of the Assembly is hereby directed to transmit copies of this resolution to" the proper people on the Civil Aeronautics Board who are meeting in Washington today.

* * * * *

[4666]

* * * * *

ORAL ARGUMENT OF MR. JAMES E. CRIMMINS

Mr. Crimmins: Mr. Chairman, and Members of the Board:

I cannot hope in the 30 minutes allotted to me to point out all the errors and fallacies in the four hours of argument you have heard. But I expect to show you enough to explode the myth of any need or urgency for a third San

[4667]

Francisco-New York nonstop carrier.

* * * * *

[4691]

ORAL ARGUMENT OF TEMPLETON BROWN, UNITED AIR LINES, INC.

Mr. Brown: Mr. Chairman and Members of the Board:

I propose to confine my remarks to the application of American, not because United ignores the application of Northwest, but because in oral argument I will not have time to do more than cover a part of the application that has been already recommended by the Examiner.

* * * * *

[4729]

CIVIL AERONAUTICS BOARD
WASHINGTON 25, D.C.

FOR RELEASE:
May 15, 1959
IMMEDIATE

CAB 59-16
EXecutive 3-3111 Ext. 7951

The Civil Aeronautics Board voted tentatively 3-2 today to authorize American Airlines to fly nonstop between San Francisco and New York.

The market is now served nonstop by United Airlines and Trans World Airlines. Northwest Airlines has also sought the nonstop authority. American presently provides through plane service between New York and San Francisco via Chicago by a combination of its existing routes.

The majority, which comprised Vice Chairman Chan Gurney, Member G. Joseph Minetti and Member Louis J. Hector, voted affirmatively on a motion that there be a third carrier and that it be American.

Chairman James R. Durfee and Member Harmar D. Denny voted in the negative.

The Board emphasized that its vote was tentative, and pointed out that its formal opinion and order, which will constitute its decision in this case, will be issued later. Member Hector dissented on the question of publicly announcing the vote prior to issuance of the Board's findings and opinion.

# # #

Docket 9214

[4730]

DOCKET NO. 9214 ET AL. E-14412

NEW YORK-SAN FRANCISCO NONSTOP SERVICE CASE

Decided: September 2, 1959

Certificate of American Airlines, Inc., for route No. 4 amended by removing restriction prohibiting nonstop service between San Francisco/Oakland and New York/Newark.

Application of Northwest Airlines, Inc., for nonstop rights between these points denied.

Authorization of a third unrestricted carrier between New York and San Francisco found warranted where record shows past air service failed to fully meet traffic needs of this major transcontinental market and where available traffic potential is sufficient to support multiple carrier service. Found that the use of jet aircraft with their greater speed, comfort, and convenience, will have a substantial impact on traffic growth in long-haul transcontinental markets such as New York-San Franciso..

Benefits to the traveling public of a fully competitive service in a market of the size and economic importance of New York-San Francisco outweigh diversion of revenue which TWA and United will suffer; traffic growth in market should go far to offset traffic lost to American. In any event, probable diversion from TWA and United will not impair their financial healthor their ability to provide certificated services.

Major consideration compelling selection of American over Northwest to provide needed additional nonstop service in this market is fact that American is already in the market as a restricted carrier and is now and has for years been a substantial participant in the New York-San Francisco traffic to be served, and it already has an established identity in the market which can be readily harnessed to stimulate the new nonstop service. On the other hand, Northwest has never been certificated to serve San Francisco, and for all practical purposes is a complete newcomer to the New York-San Francisco market.

[4730]

While need for better competitive balance and carrier strengthening are significant elements to be considered in carrier selection favoring Northwest, they are not controlling, and must be weighed in the balance along with other relevant factors; here element of carrier balance in

[4731]

terms of economic strength not found of sufficient weight to require ousting American from a market in which it has long been an established carrier and has a significant stake in the terminal-to-terminal traffic to be served.

APPEARANCES:

Same as in Initial Decision, and in addition:

Howard C. Westwood for American Airlines, Inc.

H. Templeton Brown for United Air Lines, Inc.

[4732]

OPINION

BY THE BOARD:

In this consolidated proceeding American Airlines, Inc. (American), and Northwest Airlines, Inc. (Northwest), are seeking authority to provide nonstop service between San Francisco/ Oakland and New York/Oakland in addition to that provided by United Air Lines, Inc. (United), and Trans World Airlines, Inc. (TWA).[1]

After due notice, a public hearing was held before Examiner Wlater W. Bryan. Thereafter he issued his Initial Decision in which he recommended the authorization of American as a third unrestricted carrier in the New York-San Francisco market, and denial of Northwest's application.

Exceptions to the Initial Decision and briefs to the Board have been filed by various parties.[2] The Board has heard oral argument and the case now stands submitted for decision.

Upon consideration of the record and the arguments advanced on briefs and in oral argument, we find that we are in agreement with the recommendations of the Examiner. Accordingly, we adopt as our own, except as modified herein, the findings, conclusions, and recommendations of the Examiner in his Initial Decision which is attached hereto as Appendix A.

1/ The reference New York-San Francisco throughout this opinion will be understood to mean New York/Newark-San Francisco/Oakland.

2/ Exceptions and briefs were filed by American, Northwest, TWA, and United. The City and County of San Francisco filed a brief in support of the Initial Decision. The San Francisco Chamber of Commerce, the Port of New York Authority, and the Port of Oakland and the Oakland Chamber of Commerce filed statements in lieu of briefs.

The record developed in this proceeding amply supports the Examiner's conclusion that the public convenience and necessity require the authorization of a third nonstop carrier between New York and San Francisco. The Examiner found that the New York-San Francisco market is one of our foremost air traffic markets and that in terms of passengers and passenger miles, it is the largest long-haul market in the United States with only two nonstop carriers. He observed that the traffic generating ability of this market, which he found accounted for about 250,000 passengers and over 650 million passenger-miles in 1957, surpassed many other city pairs where three or more unrestricted carriers had been authorized. He noted the tremendous growth and economic strength and the industrial and commercial importance of both New York and San Francisco and the evidence indicating their continued rapid growth and development. He found that New York and San Francisco with a combined population of sixteen and one-half million people, are substantial contributors to air commerce, and are equally dependent upon air transportation since they not only serve as major gateways for foreign and overseas travel and as important recreational and vacation centers, but are two of the top air traffic generating cities in the United States, ranking first and fifth, respectively.

Yet he found that the air service available for this major transcontinental market in the past had not matched its economic importance or reasonable traffic needs or that provided in comparable markets. He

noted, for example, the limited nonstop schedules which had been provided; the small number of coach seats available in comparison to the number of through coach-passengers in this market;[3] the unduly high load factors enjoyed by TWA and United on nonstop flights during most of 1957;[4] and the inconveniences caused by the inability to obtain the desired space and departure time on nonstop flights during peak months in 1957.

The record evidence as to the size and importance and continuing growth of the terminals and the strong community of interest existing between them, plus the data indicating that the use of jets over this long-haul segment would have a substantial stimulating impact on the already large traffic exchange between New York and San Francisco led the Examiner to conclude that New York-San Francisco would continue to be one of our top air travel markets. He estimated that the traffic volume in 1960 should be at least 44% more than in 1957, so that about 1,000 passengers a day would then be available to the New York-San Francisco nonstop carriers.[5] He pointed out that at least 25 other markets of lesser demand and potential had been authorized to receive three-carrier service and

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3/ See Initial Decision, p. 28.

4/ The Examiner found that the load factor on coach flights during the first half of 1957 averaged around 80%, and during July and September of that year the average load factor was about 90%. He concluded that load factors around or over 80% for the entire year of 1957 clearly reflected the inability of passengers to secure space during peak periods.

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concluded that the sizeable potential of the New York-San Francisco market was sufficient, with proper scheduling and vigorous promotion, to support the services of three nonstop carriers even with the substantially increased capacity to be available with jet aircraft.

Based on the above considerations, the Examiner concluded that the New York-San Francisco market clearly warranted the benefits of vigorous competitive service and that an additional nonstop carrier was required to assure the provision of the type and quantity of service to which this market was entitled and to provide the necessary competitive spur to develop the market beyond that accomplished by the existing carriers. Although recognizing that a sizeable amount of diversion would thus be inflicted on TWA and United, he found that the public benefits accruing from the new authorization outweighed the diversionary impact it would have on these carriers.

We are in accord with these findings and conclusions of the Examiner which are amply supported by the record in this proceeding and are more fully detailed in his Initial Decision. Accordingly we will not rehearse the evidence supporting the need for a third nonstop carrier, but we will address ourselves to particular exceptions warranting comment.

1. In their exceptions and briefs, TWA and United lay great emphasis on the fact that four years ago, the Board affirmatively found in the Denver Service Case[6] that an additional nonstop carrier was not required. However, we do not find that this fact precludes our reaching a contrary conclusion on this record. The size and rate of

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5/ The Examiner concluded that the market would continue to expand by at least a 10% annual rate of growth and that an additional 10% increase in traffic in 1960 would result from the stimulus of the proposed jet nonstop service. Applying these factors to the Examiner's estimated 1957 nonstop potential of 250,000 passengers produces a total of about 366,000 passengers in the 1960 nonstop market.

growth and future potential as well as the marked change in the character of the transportation demands of this market since

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6/ *Denver Service Case*, Order No. E-9735, dated November 14, 1955.

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we last considered its air service needs in 1955 have convinced us, as they did the Examiner, that three unrestricted transcontinental carriers are now required to properly serve its present and future needs. At the time of the *Denver Service Case*, the nonstop travelers did not constitute the major part of the through traffic, the nonstop market was just being developed, and grant of a one-stop service to American, which was an improvement of its former less direct routing, could provide an effective competitive transcontinental service.

However, following the *Denver Service Case*, with more long-range equipment available, the character of the market began to change with a far greater demand by the terminal-to-terminal passenger for nonstop service, thus reducing the effectiveness, from a competitive viewpoint, of the restricted carrier. Now with still newer technological developments bringing about even more dramatic changes in the Bay Area-New York air travel,[7] the trend to nonstops, as the Examiner found, will accelerate at a still greater pace. In the face of this development, differences in the route structure of the restricted and unrestricted carriers in the market are more pronounced, leaving American, whose New York-San Francisco authority requires a stop at Chicago, even less able to carry out its role as an effective third transcontinental carrier between the Bay Area and New York. Thus, despite protestations to the contrary, the award of nonstop rights to American constitutes another adjustment in the carrier's route structure necessitated by still further technological advances in trunkline equipment in order to

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7/ See Initial Decision, pp. 9-13, for a summary of the characteristics of the 707 jet which is proposed for use in this market.

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permit continuation of the benefits of a third transcontinental service between San Francisco and New York.[8]

2. The Examiner estimated that an annual volume of about 366,000 passengers, or approximately 1,000 passengers a day, could reasonably be expected to move via nonstop flights between New York and San Francisco by 1960.[9] TWA and United have challenged this forecast as overly optimistic on the ground that the Examiner employed inflated historic data, overestimated the normal growth which could reasonably be expected in the market, and failed to exclude excursion fare traffic. We are not persuaded by these contentions.

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[8] As the record clearly shows, American has been an active participant in, and a promoter of, Bay Area-New York air traffic for more than twenty years. Although American could not serve the Bay Area directly prior to May 1947, the carrier nevertheless accounted for 25.8% of the Bay Area-New York passenger-miles in 1940. As TWA and United increased their through-service between New York and San Francisco/Oakland after World War II, American's passenger-mile participation declined to 16.4% in September 1946 and to 13.8% in March 1947. In May 1947, American was authorized to serve the Bay Area directly (West Coast Case, 8 C.A.B. 14 (1947)), thus permitting through-service by American between San Francisco and New York, although subject to a one-stop at Tulsa, Dallas, or another point in the Southwest. Thereafter, the carrier's Bay Area-New York passenger-mile participation increased from 13.8% in March 1947 to 19.5% in September 1947 and 22.0% in 1948. American's share subsequently declined to 11.8% in 1953 as United and TWA increased their San Francisco-New York service over the more direct Chicago routing. Following its inauguration of DC-7 service in January 1954, American's passenger-mile participation again rose to 26.3% in March 1954. After the carrier's equipment advantage had been overcome by TWA and United and they were able to provide direct nonstop Bay Area-New York service, American's passenger-mile participation over its more circuitous routing dropped to 16.3% in September 1954 and to 13.0% in September 1955. Again, American's New York-San Francisco route structure was updated in the Denver

Service Case, supra, so as to give the carrier a more direct one-stop routing via Chicago. American's passenger-mile participation thereafter rose slightly to 15% by September 1956. However, as the trend to nonstop service in this market accelerated, American's participation declined to 11.1% in September 1957. (Exs. AA-4 and 6.)

9/ See footnote 5, page 3, supra.

In developing his forecast on the basis of historic data, the Examiner annualized the number of single-carrier local and connecting passengers moving between New York and San Francisco as shown in the Board's Traffic Surveys for 1957 as his base period. TWA and United attempted to cast doubt upon the accuracy of the Board's 1957 Traffic Survey figures insofar as they relate to New York-San Francisco traffic. It was pointed out that the Traffic Surveys prior to September 1958, based as they are on ticket sales, included many passengers moving between New York and San Francisco as common-fare passengers. Prior to the tariff change in April 1958, a traveler could buy a ticket in New York for either Los Angeles or San Francisco at the same fare. He could then go to either San Francisco or Los Angeles and make a stopover at either point, but the ticket was counted as two New York-San Francisco one-way tickets. Thus, it was claimed, the Board's Traffic Surveys in 1957 overestimated the New York-San Francisco market and underestimated the New York-Los Angeles market.

After comparison of the flow traffic data submitted by American, TWA, and United for two special survey periods in 1957, the Examiner found such a relatively small variation between the single-carrier O&D and connecting passengers as shown in the Board's Traffic Surveys for 1957, and the data furnished by the carriers, that he concluded that this single-carrier traffic reasonably reflected the nonstop potential between New York and San Francisco. We have examined the base period

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estimates of TWA and United as they appear in the record and find that the Examiner's conclusions in this regard were sound.[10] We also agree with his refusal to exclude from the base period data the excursion fare traffic. We also believe that the excursion fare travelers should be attracted to the greater speed, comfort, and convenience of jet aircraft with its dual configuration of coach and first-class seats, since we are not prepared to assume that excursion fares will not be available in the future as a traffic stimulant.[11] Accordingly, we reject the claim that the historic traffic data used by the Examiner were inflated.

We also find no merit in the attacks upon the 10% annual growth factor used by the Examiner. The O&D Traffic Surveys for 1952 through 1957 show an average annual growth rate in this market in excess of 12% and nearly a 50% increase is shown for the three-year period between 1954 and 1957. TWA and United contend that the growth trend in this market is declining; that the 1958 volume was even less than the 1957 level; and that no basis exists for assuming a 10% annual growth factor in the face of these facts. But we are not inclined to base our

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[10] As a matter of fact, United's 1957 base period estimate of 248,482 potential nonstop passengers in this market (Ex. U-110) is so close to the Examiner's estimate of 250,000 passengers for 1957 as to further support our conclusion that the Examiner's base period estimate is reasonable.

[11] It is noted that United included excursion fare traffic in its base period estimate. (Ex U-110 - p.2.) The record also shows that both TWA and United plan to drastically reduce their intermediate stop flights with piston aircraft between New York and San Francisco, indicating the small volume of excursion fare traffic they expect will move between these terminals on a single-carrier through-plane basis.

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determination as to the future needs and potential of this market on a showing of traffic decreases for such a short period of time, particularly when the traffic drop was largely experienced during a period when a general business recession was being felt throughout the country and affected traffic in nearly all markets.[12] We have noted the fact that the 1958 volume did not show a 10% increase over 1957. However, in predicting a normal 10% annual growth, it is not expected, nor does the Board's forecast so indicate, that the growth within each year will be the same, but only that it will average 10%. Obviously traffic growth in any market cannot be expected to follow a straight line and rarely does. In the present case, we estimated that the normal traffic growth in this market for the three-year period (1957-1960) will amount to 33% with an additional 10% to reflect jet stimulation in the market in 1960. The fact that the 1958 volume did not show a 10% increase over the 1957 volume does not invalidate our forecast or preclude the attainment of the 1960 volume of traffic we anticipate.

We are not persuaded that the long-continued growth of the New York-San Francisco market has ended. Indeed, we think the indications are favorable for greatly increased travel in this market. In addition to a 10% annual growth factor, the Examiner employed a 10% jet stimulation factor for 1960 to reflect the impact of jet aircraft on the market. TWA contends that the 10% jet stimulation factor is too high and that no more than a 5% factor is warranted. We cannot agree. A 5% factor reflects the amount of jet stimulation which TWA has estimated for its system. However, the record clearly indicates that the greater speed and other inherent advantages of jet aircraft will be of greater benefit in extrene

long-haul transcontinental markets than in short-hop markets. Thus, it would be reasonable to assume that greater impact on traffic growth from this type of service would be felt in markets like New York-San Francisco. Use of a system-wide factor here fails to reflect this difference. In addition to the Examiner, Bureau Counsel and all of the other carriers predicted jet stimulation at at least 10% which we believe is a more reasonable estimate than the 5% factor urged by TWA.[13/]

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[12] Preliminary traffic data for the month of May 1959 show an increase in industry revenue-passenger miles of over 16% over May 1958.

3. Besides challenging the Examiner's estimate as to the amount of traffic which will be available, TWA and United dispute the economic feasibility of authorizing three jet nonstop carriers between New York and San Francisco. It is asserted that the segment is lacking in backup traffic support; that even the volume of local traffic forecast by the Examiner would not support three carriers on a profitable basis; and that the volume of daily terminal-to-terminal passengers which can reasonably be expected to move via jet nonstops in the future will be fully accommodated by the proposed schedules of the existing carriers. United contends that three carriers operating three daily round trips with jets providing substantially more capacity than the total number of nonstop travelers to be exchanged between New York and San Francisco, would experience load factors far below a breakeven level. United estimated that if a third unrestricted carrier is authorized, all three carriers would suffer substantial losses at least through 1965, and that these losses would wipe out any profit for United's system at existing fare levels through 1961, or at the very least would seriously impair its financial position; and that TWA's situation would be even worse.[14/]

13/ United forecast a 12% factor to reflect the impact of jets on market the length of New York-San Francisco.

14/ TWA did not similarly construct estimates as to its losses resulting from multiple carrier competition in this market but took the position that there was no reason to believe that it would be in any more favorable position than United.

We are not persuaded by these contentions. In the first place, United's estimates are based upon traffic forecasts which we have rejected. Secondly, United erroneously assumes that each carrier must operate a minimum of three daily round trips regardless of the available traffic. The crux of the scheduling problem turns on the question of whether, as United contends, a carrier must offer a minimum of three daily round trips in order to be a factor in themarket. American disputes United's claim in this regard, and pointed out in its brief and on oral argument that a full pattern of service by each carrier, tailored to meet the available traffic would in 1960, consist of three daily round trips per carrierin the peak season, and two daily round trips in the off season.[15/] We find American's position in this regard persuasive. So long as the competing carriers tailor their service to the needs of the available traffic, we see nothing inherent in the scheduling of jet aircraft to require more than two daily round trips per carrier in the off season.

Obviously, jet aircraft with their much greater capacity requiring a larger passenger load for their support, do not generally permit management as much schedule flexibility as is possible with piston aircraft, and it must be recognized that frequency of service will of necessity be much less in the jet than in the piston age. But that does not mean that adjustments in schedules to meet the demands of the market cannot be made or that management in its use of jet equipment, as contrasted with piston-aircraft, must rigidly follow a schedule pattern it has projected for the future, even though the traffic to which it may then have reasonable access is less than it previously anticipated. As the Board pointed out in its

opinion in the Suspended Passenger Fare Increase Case,[16/] where a carrier's preexisting plans for expansion of equipment and services are

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[15/] American had originally proposed three daily round trips throughout the year.

in conflict with route actions taken by the Board, the carrier must alter its plans in conformance with that action. That admonition is no less relevant today than it was then.

To some extent, the New York-San Francisco market affords greater flexibility for the scheduling of flights and for adjusting capacity to traffic volume than is presently possible with the DC-7's. Because the greater speed of the turbojet and the length of the segment will overcome the time barrier between the east and west coasts, a convenient midday departure from both coastal terminals will be possible for the first time, thus making available more hours during the day in which flights can be scheduled for the accommodation of the travelers. In addition, the seasonality in traffic moving over this segment permits further adjustment of schedules. In short, we are not convinced by United's argument as to the required method of operation for three carriers in this market. We see no reason why, during the initial period of operation, schedules should not be tailored to take advantage of the seasonal variation in the market. By so doing each carrier can have a well-rounded pattern of jet nonstop service - three daily round trips in the summer peak season and two in the off season or an average of 7.5 daily round trips over the entire year - and, with the traffic volume we expect in this market by 1960, operate at above breakeven load factors.[17/] After that, normal traffic growth should soon permit operations by the three carriers on a more profitable basis, since all the carriers concede that the market will continue

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16/ Order No. E-11812, dated September 25, 1957.

17/ On an average of 7.5 daily round trips and assuming an average of 112 daily seats per flight and 1000 daily passengers, the average load factor would be about 59.5%. On the basis of the cost and revenue forecasts in the record, the breakeven load factor for the 707 jet was estimated to be about 54.3%.

to grow. Ultimately, we fully expect the sizeable growth potential of this rich and important long-haul market will warrant the scheduling of additional frequencies by the three carriers.

4. TWA and United assert that their present San Francisco-New York nonstop services are more than adequate to meet the needs of the market; that the market already has the benefits of fully competitive service; that their proposed jet operations will more than satisfy the market's service needs; and that no additional nonstop carrier is required. They contend that TWA has carried at least 90% of its pro rata share of the market, and that this clearly refutes the Examiner's finding that TWA has failed to provide effective competition. They claim that the Examiner's finding of a need for an additional carrier was based on the past pattern of service during a brief period of equipment shortage, and that the Examiner's findings of past inadequacies of service are contradicted by the evidence showing a substantial number of empty seats on nonstop flights and user testimony as to the adequacy of TWA's and United's present nonstop New York-San Francisco service.

While it is true that TWA and United at the time of the hearing were providing a substantial volume of nonstop schedules, both coach and first-class, between New York and San Francisco, this pronounced improvement in service did not occur until after the question of the need of additional service had been raised by this proceeding. But the record clearly shows, as the Examiner found, that the past services provided by these carriers, although not legally inadequate within the meaning of the Act, did not fully

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meet the needs of the traveling public.[18/] As is more fully set forth in the Initial Decision, the record discloses that between September 1954 and March 1957, the number of nonstop flights scheduled by TWA and United remained essentially unchanged, despite a 44% increase in traffic; only a limited amount of first-class nonstop service was available; and the only nonstop coach service offered the New York-San Francisco traveler prior to May 1957 consisted of an eastbound combination first-class and coach flight operated by TWA.[19/] The evidence clearly shows that during and prior to 1957 it was difficult for the traveler to obtain his choice of schedule or departure time on nonstop coach flights during peak periods. In March 1956 a total of only 20 nonstop coach seats per day were scheduled although 225 one-carrier coach passengers per day moved in this market. A year later in March 1957, still only 546 nonstop coach seats per month were made available for the 3800 exclusive coach passengers traveling between New York and San Francisco during that month. Even after the sharp increase in nonstop schedules between New York and San Francisco subsequent to March 1957,[20/] load factors on nonstop flights during the summer of 1957 remained high.[20a/]

Despite the contentions of TWA and United to the contrary, we think the Examiner properly found that the New York-San Francisco market has not in

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18/ The Board has often certificated new service because of the substantial benefits which would flow therefrom even though the existing service is not legally inadequate. (*Southwest-Northeast Service Case*, Order No. E-9758, dated November 21, 1955; *Denver Service Case*, Order No. E-9735, dated November 14, 1955; *New York-Chicago Case*, Order No. E-9537, dated September 1, 1955; *Tucson Airport Authority*, Order No. E-10487, dated July 27, 1956; *New York-Florida Case*, Order No. E-10645, dated September 28, 1956.)

19/ The pattern of nonstop schedules offered by TWA and United in the New York-San Francisco market is set forth in Appendix 1 attached to the Initial Decision.

20/ Between April 1957 and September 1957, TWA and United increased their daily nonstop flights in this market by 75%.

20a/ We agree with the Examiner that the high load factors enjoyed by the existing carriers on their nonstop coach flights during the summer of 1957 clearly reflects the inability of passengers to secure space during peak periods.

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the past received that type of vigorous competition which its size and economic strength warranted. As he pointed out, from the time when nonstop service was first inaugurated between New York and San Francisco, until the pendency of this proceeding, TWA never matched either the quantity or the quality of United's service. For example, for 67% of the above period of time TWA provided only 33% of the total nonstop service, and 25% of the time provided only 20% of the total. Moreover, its service was not comparable since its one nonstop flight was 6.7% slower eastbound and 16.7% slower westbound than United's DC-7's. The fact that prior to 1957 TWA's participation amounted to about 80 to 90% of United's, although providing only one nonstop flight as against United's four, does not in our opinion, refute the Examiner's finding that TWA was not a full-time vigorous competitor. On the contrary, such a disparity in service and participation should more likely be attributed to the lack of sufficient nonstop flights in the market to meet the demand and the fact that United provided no coach nonstops.

TWA and United have explained that the space problem on nonstops in the summer of 1957 was due to a lack of equipment and not to the pendency of the present proceeding. However, in view of the extremely large increase in nonstop schedules after the motions for early hearing in this proceeding had been filed, as contrasted to the limited number operated in this market for several years prior thereto,[21] we do not believe the equipment shortage supplies the basic answer, although it may have contributed to the situation. Moreover, nonavailability of aircraft does not offer a sufficient reason for

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[21] In March 1957 a total of 5 nonstops were scheduled by the two carriers. By September 1957 the total number of nonstops had increased to 14.

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the limited amount of nonstop coach service scheduled as contrasted with nonstop first-class service. In all the circumstances, we do not believe that the recent improvement in service affords a sufficient basis for denying this market the benefits of effective multicarrier competition in view of the previous long-standing scheduling practice of the existing carriers.

We are not unmindful of the fact that these carriers have indicated their plans to inaugurate a full pattern of jet nonstop service between New York and San Francisco in the near future, which would provide a substantial amount of additional capacity for the accommodation of the San Francisco-New York travelers. However, in our opinion, the needs of the traveling public between New York and San Francisco have not been fully met in the past and we do not believe it would be consistent with our statutory obligation under the Act and our decisions thereunder to maintain the status quo and rely on the assurance of the carriers that the huge-capacity jet will provide the competitive spur necessary to insure the service benefits to which we have found this market entitled. In our judgment, in providing for the future as well as the present needs of a rich market with the ultimate potential of San Franicsco-New York, and one which should be substantially enhanced by the unique advantages of jet aircraft, the authorization of a third carrier holds the greatest prospect for the full development of that potential. The Board has previously expressed its views with respect to the benefits of competition on too many occasions to require repeating. The authorization of a third New York-San Francisco nonstop carrier here is consistent with those views and will afford comparable benefits in this market.

5. United and TWA stress the importance of the New York-San Francisco market to their financial well-being, and they contend that the sizeable amount of diversion they will suffer if a third carrier is added will seriously affect their financial positions. It is pointed out that this market is United's most important, producing 7% of that carrier's total

revenue passenger-miles in 1957, while it is TWA's second most important market. The carriers note the Examiner's finding that American in 1960 will realize almost $12,000,000 in gross revenues from this market and they contend that this diversion of revenues in the face of their declining earning positions and during the period of jet financing will be extremely damaging to their system operations.

Undoubtedly our decision herein will cause substantial diversion from these carriers, as the Examiner found. But we do not envisage any serious financial harm accuring from the authorization of a third unrestricted carrier in this rich market.[22] As the Board pointed out in other cases,[23] the loss of traffic to TWA and United should, to a large extent, be compensated by the growth of the traffic in the market, thus tending to sustain the revenue of these carriers despite a reduction in their percentage participation in the New York-San Francisco traffic. Based on the forecast of 366,000 nonstop passengers in the market in 1960, this increase in the market over that experienced in 1957 would mean that United and TWA would still experience a gross *increase* in passenger revenues of $1,120,585 and $1,009,096, respectively, in 1960 over their 1957 revenues (See Appendix B).

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Naturally, the impact of diversion on the carriers already in a market is considered before additional service is authorized. But, unless the diversion will result in a serious economic weakening of a

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[22] It should be noted, however, that the $12 million dollar estimated diversion refers to gross revenues and clearly does not mean that the carrier's profits will be affected in that amount. Moreover, rather than being faced with declining earnings, TWA's and United's net income for the twelve-month period ending April 30, 1959, showed a sizeable 245.4% and a 110.1% increase, respectively, over their net income for the corresponding twelve-month period in 1958 (Forms 41).

[23] See for example *Great Lakes-Southeast Service Case*, Order No. E-13211, dated November 28, 1958.

carrier, it is not a sufficient public interest factor to justify denying the public a needed new service.[24/] In assessing the impact of probable diversion here, it must be recognized that we are dealing with one of the top revenue producing segments in the country, with two of our largest carriers, and that a large segment of the traveling public is affected by our decision. In weighing the advantages to the public against the injury to the carriers, we find that the present and long-range benefits of the additional service being authorized outweigh the effect which such service may have on TWA and United. We are unable to find that the probable diversion resulting from our decision to permit American to provide nonstop in addition to its one-stop service will impair the financial health of either carrier or either carrier's ability to provide certificated services.

Fears of diversion and estimates of substantial losses such as are asserted here, have a familiar ring as they are interposed by the existing carriers in the market in every new route proceeding coming before us. Yet the same carriers who are concerned about diversion in their own markets continue to press for the need for additional competition in markets in which they are not authorized to operate. Despite the addition of a substantial amount of new competitive service in many markets during the past several years, the aviation industry has continued to grow and prosper and the number of passengers being transported by the air transport industry has increased year by year. We have no reason to believe any different result will occur in this market from our decision herein.

6. TWA and United also argue that the record is devoid of any reliable data based on actual operating experience of turbine aircraft,

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[24/] Great Lakes-Southeast Service Case, supra.

and that it is impossible to ascertain with any degree of accuracy the impact of high-speed, huge-capacity jets on traffic, schedules, fares, load factors, or costs. Absent such data, they assert, the Board cannot intelligently predict the feasibility of three-carrier nonstop competition in the jet age in the New York-San Francisco market, nor can the Board's stated purpose of using this case as a "test tube" to form the basis for a study on the economics of jet operations for future proceedings be atained. Under these circumstances, the carriers insist, decision must be deferred until more tangible evidence with respect to the actual performance, traffic stimulation, and costs of jet service is available; and that since jet equipment is already in use such data could be obtained without any unreasonable delay or undue prejudice to any party to the proceeding.[24a]

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We recognize that precise accuracy in determining cost estimates of a turbine aircraft, which for the purposes of this record, is as yet unused, is unattainable. While we agree with United and TWA that it might be preferable if data based on actual operating experience of jet aircraft were in the record, we do not believe its absence is fatal or requires us to delay authorizing a service we have found required. Extensive exhibits and a great deal of testimony covering every conceivable aspect of jet operations, including performance characteristics of the 707 aircraft, the impact of jet operations on passenger traffic and routings, the effect on cargo movements in this market, and the relative costs of jet and piston-engine operations as related to this market are in the record. While admittedly American's cost estimates are based on the manufacturer's performance estimates and specifications and not on actual operating experience, it is conceded that the 707 is the most extensively tested aircraft introduced into commerical aviation. The Board must necessarily rely upon estimates as to future conditions, and has customarily done so, both as to costs and traffic. There is no reason to treat the estimates as to jet operations any differently here. Even if we deferred our decision for a reasonable period in order to obtain later data based on actual operating experience with jet equipment, we are not persuaded that such data necessarily covering only a relatively short operating period, would provide any materially different or more reliable information with respect to economics of turbojet service than we now have available before us.

[24a] It is claimed that the present proceeding was instituted "out-of-turn" contrary to the usual priority of filing practice of the Board in setting applications down for hearing. Similar allegations were previously considered by the Board in its Order of April 9, 1958 (Order No. E-12337), wherein the Board rejected the allegation of procedural error in setting this case down for early hearing. Nothing has been presented at this time which would warrant the Board to reach a different conclusion nor has any showing been made that TWA and United were prejudiced by the action of the Board in this regard. As we stated previously, while the Board customarily assigns applications in the order of filing, (footnote continued on next page)

The fact of the matter is that the record in this case on the basic elements of public convenience and necessity, including the effect of the introduction of jet aircraft on the route, is as thorough and complete as one could reasonably expect. The stakes in the case have been high, and the parties have thoroughly litigated the issues both on the

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24a/ (footnote continued) a priority-of-filing policy seldom has a chance to operate and numerous exceptions have been made where in the Board's opinion circumstances justify such action. No provision of the Act or rule of the Board specifically spells out the order in which the Board shall hear its cases. The policy to be followed in the disposition of its docket is left largely to the discretion of the Board so as to enable it to properly administer the Act in accordance with the public interest. Our reasons for assigning this case for early hearing are adequately stated in our previous orders, and for the reasons expressed therein the Board is convinced that expediting the proceeding was fully warranted and that in this case blind observance of the priority of filing practice would not have been in the public interest.

Francisco-New York market, which can be readily harnessed to stimulate the new nonstop service.

Operationally, of course, the proposed new service would integrate to a far greater extent with American's present system. Since it serves San Francisco on other routings, American would be in a better position, from an equipment and scheduling standpoint, to meet departure times and to provide extra capacity to satisfy peak demands when needed. On the other hand, Northwest, whose transcontinental route extends from the east coast to Seattle some 500 miles to the north of San Francisco, and with no present service out of San Francisco, would have less operational flexibility.

Contrary to its claims, Northwest has failed to demonstrate that it can offer greater public benefits than can American if it were awarded the route. While Northwest has urged that it has a superior record in promoting low fare coach service, we are unable to find that Northwest will offer any greater

prospect for effective coach service than American in this market. American's proposed schedules, with mixed configuration aircraft, give as much promise as Northwest's for improved coach service.

Much has been said in this proceeding regarding the Denver Service Case, and the established Board policy favoring the strengthening of smaller carriers in order to achieve a better competitive balance. Northwest has relied heavily upon this policy in attempting to persuade us as to the merits of its application. But the prior decisions of this Board make it clear that considerations of competitive balance and carrier strengthening, while significant, are not controlling, and must be weighed in the balance along with other relevant factors.27/

As previously noted, this Board has consistently recognized historic interest in a market as a factor of importance in carrier selection, and where as here the historic interest is as sizeable and as long standing as American's, we are impelled to give it great weight.[28/] We know of no case where we have allowed the factor of competitive balance to override so substantial an historic interest in a market as American has shown here. And, we can find no sound justification on this record for ousting American from the New York-San Francisco market merely to achieve a better carrier balance in terms of economic strength.

27/ St. Louis-Southeast Service Case, Order No. E-13026, dated September 30, 1958.

28/ "*** in choosing among competing applicants to serve a given market, a carrier already participating in the market on a restricted basis enjoys some advantage over a completely fresh applicant *** the carrier with a historic interest in the market already has some stake in the market and is entitled to some special consideration in the light thereof." (Eastern Route Consolidation Case, Order No. E-11184, dated April 1, 1957.) Cf. Chicago-Milwaukee-Twin Cities Case, Order No. E-13890, dated May 19, 1959.

It is true that in the Denver Service Case, the Board expressed concern, in terms of competitive balance, over the award to American of a Chicago-San Francisco route that gave the carrier a one-stop New York-San Francisco service. But the fact remains that the Board granted American this improved New York-San Francisco authorization, and the carrier has relied upon it in developing its share of this market. Since permitting American to provide nonstop in addition to its present one-stop service will amply meet the needs we have found required, we believe it would be anomalous at this late date to inject Northwest as the fourth carrier between New York and San Francisco and maintain restrictions on American, which is already a substantial participant and an established carrier in the terminal-to-terminal traffic to be served.

We have given due consideration to all of the exceptions to the Initial Decision and find that they should not alter our decision herein.

Accordingly, on the basis of the foregoing and all the facts of record we find:

1. That the public convenience and necessity require the amendment of the certificate of American Airlines for route No. 4 so as to eliminate therefrom the restriction against the provision of a nonstop service between San Francisco or Oakland, Calif., on the one hand, and New York, N. Y., or Newark, N. J., on the other hand.

2. That American is fit, willing, and able to perform such transportation properly and to conform to the provisions of the Act and the rules, regulations, and requirements of the Board thereunder.

3. That the motion to reopen the record filed herein by United Air Lines should be denied.

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4. That, except as indicated above, all applications herein should be denied.

An appropriate order will be entered.

Gurney, Vice Chairman, Minetti and Hector, Members of the Board, concurred in the above opinion. Durfee, Chairman, and Denny, Member, filed the attached joint dissenting opinion.

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DURFEE, CHAIRMAN, AND DENNY, MEMBER, DISSENTING:

We strongly disagree with today's decision in this case.

The record is not ripe for a Board decision since it contains no evidence of the economic and operational impact of the introduction of jet aircraft - the prime and stated purpose of the Board in hearing this case out of its normal order. Further, the record is devoid of any evidence of a public need for the additional competition authorized; the volume of traffic forecast by the Board is insufficient, on the basis of the Board's findings of fact, to economically support three non-stop carriers; and the diversion that will be suffered by the existing carriers, on the basis of the Board's forecast, will seriously injure those carriers and, consequently, the air transportation system. In our opinion, on the record before us the Board has no alternative but to deny American's application or, in the alternative, remand the case to the Examiner for further hearings.

The stated basis for the Examiner's Initial Decision, adopted by the majority, is that the addition of a third non-stop carrier is required in order to improve the existing service. However, since there is little, if any, evidence of a need for additional service, and because the existing service is more than adequate, it becomes apparent that the majority opinion is based upon a theory of competition for competition's sake. The authorization of duplicating service based upon the foregoing theory is completely contrary to Board precedent and policy. Under the Act, the Board is adjured to consider as being in the public interest competition to the extent necessary to assure the sound development of

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an air transportation system properly adapted to the commercial, postal and defense needs of the nation, and to foster sound economic conditions in such transportation. The foregoing has never been considered by the Board, at least in recent years, to be a mandate for the authorization of competition merely for the sake of having competition.

On the contrary, the Board has not in the past authorized three or more carrier competition unless the evidence showed that the existing service was clearly inadequate, or that there was a pressing public need for an additional carrier. Neither of these factors is present herein. There is absolutely no evidence that during any period of time the existing service has been clearly inadequate. Furthermore, there is no dispute that the present service, since mid-1957, is more than adequate.. Additionally, no finding can be made that the proposed service of United and TWA will not be fully adequate.

The Board in this case has not made a finding of inadequacy of service. The most the majority implies is that for a short period of time, due to equipment shortages, the service was marginally adequate. Very significantly, the majority fails to support its decision by any Board precedent. Insofar as we can determine, the Board has never authorized a third competitive carrier based upon the type of evidence that has been presented in this case.

1. The public convenience and necessity do not require a third non-stop carrier.

The record contains no substantial evidence which would support a finding that there is either a need for a third non-stop carrier or that the public would be adversely affected if a third non-stop carrier

were not certificated at this time. Both the Examiner and the majority agree that the existing service is adequate as to quality and quantity.

The majority conceded that from mid-1957 the existing carriers have provided a substantial volume of non-stop schedules, both coach and first-class, between New York and San Francisco. In addition, the record clearly shows that these flights have been operated at relatively low load factors.

The record, then, is clear that the service since mid-1957 has been highly adequate. Moreover, the majority was unable to specifically conclude that there was inadequate service in this market during any past period of time. The very worst that the majority was able to state with respect to service in this market was that prior to mid-1957, non-stop coach service between the two cities, although legally adequate, did not fully meet the needs of the public since the load factors were relatively high. During this short period of time, however, the record is clear that first-class non-stop service was more than adequate.

Contrary to the majority, the evidence shows that prior to mid-1957, and during the transition period when United and TWA were acquiring new equipment, both carriers provided 212 non-stop coach seats per day and 477 coach seats per day on one-stop schedules. The fact that more first-class non-stop seats were provided than coach seats during this period does not mean inadequate coach service. In fact, there is no evidence that at any time first-class passengers were denied non-stop seats, and no evidence that any coach passengers were denied

seats on either non-stop flights or one-stop flights. The majority concluded that "non-availability of aircraft does not offer a sufficient reason for the limited amount of non-stop coach service scheduled." In our opinion, carriers should not be criticized or penalized for the number of coach seats provided vis-a-vis first-class seats during a short period of time when equipment shortages existed, so long as there is adequate service being provided coach passengers on either non-stop or one-stop flights.

Insofar as the existing service is concerned, the evidence shows that during the period July 1957 - August 1958, United had an average load factor of 65 per cent. For the period January 1957 - July 1958, TWA's first-class non-stop load factors have been well below 65 per cent, except for the month of May 1958. Significantly, in August 1958, TWA's all-coach flight departing from San Francisco at 10:15 A.M., operated during the entire month at an average load factor of 35 per cent.

The witnesses for San Francisco conceded that they were not either criticizing the services of TWA and United, nor alleging inadequate service, per se. The Examiner did not find that the evidence submitted by San Francisco showed inadequate service. San Francisco's primary argument was not inadequacy of service, but that Los Angeles had three non-stop carriers. Obviously, the fact that Los Angeles has three non-stop carriers has no bearing on the New York-San Francisco situation. Los Angeles is the largest West Coast city, and the only one with three-carrier competitive service to New York. It is also the fastest growing city, and by no economic measurement can San Francisco be considered comparable to Los Angeles. Significantly, the majority opinion

makes no attempt to justify the third nonstop carrier between New York and San Francisco on the basis that New York-Los Angeles has three non-stop carriers.

The majority, in an attempt to support the argument of "service that did not fully meet the needs of the public," stated that the existing carriers failed to increase the number of New York-San Francisco non-stops until mid-1957, when it was apparent that the Board would institute the present proceeding. The record is crystal clear as to the reasons that TWA and United did not increase the number of New York-San Francisco non-stops prior to mid-1957. Although the majority mentions the TWA and United equipment shortage, no attempt was made to analyze the problem, particularly with respect to the delivery dates of the new equipment. Both United and TWA placed orders for additional DC-7's and Lockheeds in early 1955, but deliveries for United did not begin until the first quarter of 1957, and for TWA, until mid-1957. The fact that a carrier does not receive equipment until 2 1/2 years after it has been ordered certainly does not mean that the carrier is not willing or able to furnish adequate service. Certainly the Board should not penalize or criticize a carrier because it has adopted a prudent and conservative policy toward the purchase of new equipment. During that period in which United and TWA were unable to inaugurate additional New York-San Francisco non-stops due to equipment shortages, both carriers were nevertheless operating a frequent and well-rounded pattern of service in the market, both

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non-stop and one-stop. As shown by the following table, the service was highly adequate:

UNITED'S AND TWA'S SAN FRANCISCO-NEW YORK NON-STOP AND ONE-STOP FREQUENCIES

(1957)

	Non-stop	One-stop	Total
January	5	11	16
March	5	11	16
May	8	9	17
July	10	7	17
September	14	4	18
November	13	4	17

The majority also concluded that additional competition is needed in this market because it has not in the past received the type of vigorous competition to which it is entitled. The evidence does not support the foregoing conclusion. Both United and TWA have for a long period of time competed vigorously for the traffic. As shown by the Air Traffic Surveys, these carriers have provided effective competition for each other. In 1953, TWA out-carried United, and during the period 1954-1957, the division was roughly 55 per cent - 45 per cent in favor of United. The passengers carried on through-plane service in the 1957 survey periods split 52.5 per cent United, versus 47.5 per cent TWA, but in March 1958, TWA again out-carried United by a small margin. The foregoing data clearly shows vigorous and effective competition between these two carriers.

The allegation of the Examiner and the majority that three-carrier competition is needed in this market to insure such alleged benefits of competition as (1) authorization of the most modern equipment; (2) increased coach service; and (3) improved quality and quantity of service, cannot be supported. Insofar as the first allegation, it is undisputed that United and TWA will provide the most modern jet-type aircraft over this route,

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and the certification of a third carrier will not improve the type or quality of equipment to be operated.

As to the question of coach service, the existing carriers are presently operating a greater number of daily unused non-stop coach seats than first-class seats. TWA and United have historically and still do provide a far greater proportion of their services at coach fares than does American, and there is no reason to expect American to provide any additional spur on this score. There is no basis for the Examiner's finding, adopted by the majority, that TWA and United are providing just the minimum standard of service contemplated by Section 404(a) of the Act, in view of the undisputed fact that in July 1958, there were 324 empty New York-San Francisco non-stop seats operated.

With respect to the allegation that there will be an improved quality and quantity of service, we find that this also cannot be supported. In fact, it is our opinion that the certification of a third carrier will not contribute in any way to the quality and quantity of the existing service. According to American's exhibits and testimony, it will establish competitive schedules with those of United and TWA. There are only three periods during the day that represent convenient departure times - morning, noon and evening.

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All three carriers will have to establish competitive schedules at those times. The third carrier will offer nothing but additional space which, based on the present and forecast traffic volume is not needed.

An additional carrier would provide no greater convenience, superior equipment, or even different schedules. The principal result, rather than improving the standard of increase, will be an increase in the volume of service at the three peak demand periods during the day, an increase in volume which is not necessary and will only result in lower load factors for each carrier. Therefore, since volume of service is the principal result rather than an over-all improvement in the standard of service, the establishment of a third carrier is not justified.

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Even if we assume that during a limited past period, service may have been only marginally adequate, that assumption, per se, cannot be used as a reason to establish three-carrier nonstop competition where there has been an adequate explanation for the short-term deficiencies. Never before has this Board found service to be inadequate on so slim a reed as the experience during a four or five-month period of one year where service has admittedly been adequate both before and after. Never before has this Board placed such a premium, in evaluating adequacy of service, on the failure of carriers to introduce new nonstop equipment as soon as its competitors. The Board does not attempt to meet the explanations offered by United and TWA, but nevertheless the implications of the Board's decision are clear: Every carrier must gain first place on the production lines for new equipment; the lag between new equipment orders and deliveries is no excuse for not providing service with the latest equipment types in use in the industry. Clearly such overemphasis on the ability of carriers to meet short-run traffic demands in an industry where lead time on new equipment can be up to five years is unsound, and if this policy is to be followed in future route cases, it will encourage premature and uneconomic equipment decisions.

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The majority reaches a contrary conclusion to the Denver Service Case as to the need for a third nonstop carrier in this market. In that case the Board found that the public convenience and necessity did not require a third nonstop carrier between New York and San Francisco, and placed an affirmative restriction in the certificate granted to American. The primary purpose of the restriction was to preclude American from providing competitive nonstop service. The Board found that this was necessary in order to preserve the competitive balance in the transcontinental field. There is nothing in this record to show that there has been any change in the need for preserving the existing competitive balance in this market. In fact, the desirability of maintaining such balance is stronger now than at the time of the Denver Service Case, due to the inauguration of jet aircraft.

2. The New York-San Francisco market will not economically support three nonstop carriers.

Simple arithmetic applied to the Board's forecast traffic, and in view of the carrier's capacity forecast, conclusively shows that the decision herein is uneconomic and contrary to the public interest.

The Board has forecast 365,000 nonstop passengers for 1960, or 1,000 per day. All the applicants, including American, proposed three round trips per day, which with 112-seat Boeing 707's would provide 2,016 seats daily in the market.1/ This would result in an average annual

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load factor of 49.6 per cent, a load factor which is highly uneconomic, according to the Board's own findings. Even if it is assumed that the 10 per cent annual growth forecast by the Board would continue beyond 1960, it would be 1961 before the three carriers could even approach the hypothetical and unrealistic breakeven load factor of 54.3 per cent adopted by the majority. Consequently, all three carriers will suffer

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1/ The record shows that 2,124 daily seats would actually be operated in view of TWA's proposed 120-seat Boeing configuration and United's proposed 122-seat DC-8 configuration. In addition, United proposed a fourth daily jet one-stop schedule for 1960, to be operated as a nonstop in 1961.

substantial losses at the very time profits will be needed for the completion of the jet transition, and on a segment that is of vital importance to the financial well-being of the carriers presently serving the market.[2] Significantly, the Examiner found that three-carrier competition would result in serious depressed load factors through 1960, and Bureau Counsel concluded that the route would not be operated at a profit until sometime after 1960.

American belatedly recognized on Brief to the Board and oral argument that the operation of this route by three non-stop carriers would be highly uneconomic and therefore advanced a new argument. American proposed that all three carriers reduce schedules during the winter season from three round trips per day to two. Aside from the fact that this proposal is directly contrary to the forecasts of record,[3] and aside from the fact that it would be competitively untenable

for the carriers to reduce schedules when the market demands schedules during three distinct daily periods, American's proposal is inherently adverse to the public interest. Simply stated, American proposes that the travelling public should receive inferior service during six months of the year for the sole purpose of accommodating American in the market.

The majority not only adopts American's argument, but in addition adjures the carriers to limit their schedules as American proposes.

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[2] New York-San Francisco is United's most important route segment from a revenue producing standpoint, and TWA's second most important route.

[3] Witnesses for American as well as TWA and United testified that the minimum schedule pattern to meet the convenience of the travelling public in this market requires three round trips a day, with departures morning, noon and evening. Significantly, San Francisco specifically stated that three round trip schedules were needed, morning, mid-day and evening by each carrier. In fact San Francisco selected American to provide the service over Northwest for the primary reason that American had proposed three round trips per day on an annual basis.

This is the first time to our knowledge that the Board has not only forecast an inferior public service in adding new competition, but sounded a warning to the carriers that is intended to assure that inferior service will result.

Despite the majority's warnings, it is virtually inevitable that all three carriers will provide three round trips per day on an annual basis. As hereinbefore shown, the minimum schedule pattern, in order to meet the convenience of the public, is three round trips per day. Even this pattern represents a substantial decline in the departure choices available to the public during recent years. The public will demand convenient service, and the very competition which the Board is introducing here as a spur to provide additional service will compel the provision of the service. None of the carriers, least of all American, will be able to avoid scheduling a minimum of three flights without sacrificing its share of and identity in the market.

This matter of scheduling illustrates in the clearest terms our position on the lack of need, or lack of proof of need, for a third carrier. It is not disputed that two carriers can and will provide schedules which will carry the traffic, and the load factor data derived from the majority's figures so shows. United and TWA will provide schedules that will meet the schedule timing needs of the traveling public, and they will do so at a profitable, yet reasonable, load factor (69 per cent) on the basis of the majority's 1960 traffic forecast. The certification of a third carrier will inevitably result in unprofitable operations for all three, or, in the alternative, the public will be severely inconvenienced by the decrease in frequency. The public gains nothing in the way of improved service at any time aside from additional empty seats which must inevitably be paid for with higher fares. There is no improvement in quality of service, timing of schedules, improved aircraft, or any other service factor.

We reiterate that the foregoing observations are predicated on the Board's own findings and conclusions, not on different facts. In addition, moreover, we have considerable difficulty with the findings of fact.

The traffic and diversion forecasts are inherently erroneous. The 365,000 annual passengers forecast by the majority assumes a 10 per cent "normal growth" per year from 1957 to 1960. The majority

concedes that 1958 traffic shows a decline from 1957.[4/] Experience, therefore, has already seriously weakened the majority's forecast. Perhaps in future years the forecast growth rate will be realized, but the significant fact is that in light of 1958 results, traffic will not reach 365,000 passengers in 1960 unless the growth rate is considerably higher than the majority has forecast. The majority's decision, therefore, has no rationale support. This again is simple arithmetic based on facts which are contained in the Board's decision, but which the Board overlooks. The Board tries to explain why there was no growth in 1958, but still assumes in its forecast of 1960 traffic and its forecast of diversion (see Appendix B), that the growth actually took place. This error is compounded by assuming a 10 per cent 1958 growth in computing the 1959 and 1960 growth forecast and further compounded by applying the jet stimulation factor of 10 per cent to the erroneous 1960 forecast.[5/]

On the basis of the majority's growth forecast rates, and assuming the 1958 traffic was the same as 1957, the 1960 traffic would be only 332,750 annually, or 884 passengers per day. On this basis, TWA and United alone would average only a 61 per cent load factor. If a third carrier were added, their average load factors would be a disastrous 42 per cent; and even if all carriers cut back schedules as proposed by American, average load factors would be a losing 50 per cent.

4/ See the majority opinion, pp 7-8

5/ These inherent errors are further compounded by the use of CAB O&D Survey data as a base, that includes Los Angeles traffic and also international traffic that now moves direct to destination via international carriers.

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In light of the foregoing, without regard to what the growth will actually be, it is apparent that the majority's decision is based on patently erroneous findings.

We have little doubt that overall traffic growth will return to a more normal trend now that the recession has clearly ended, although there is no basis on this record for assuming that the rate of growth will return to pre-1958 levels, particularly for long-haul markets like New York-San Francisco. Similarly, we believe that jet service will stimulate new traffic, but in the absence of more concrete evidence, which this case was intended to, but did not, elicit, we think there is a strong basis for questioning whether the long-haul domestic market such as New York-San Francisco will realize increases as significant as the majority assumes.

In a situation like the present one, when the record is inadequate, where strong and vigorous competition admittedly exists, where the alleged temporary deficiency in past service was so relatively insignificant, where the new carrier will provide no new service and therefore not stimulate any new traffic, and where the stakes involved for the future of the carriers and their ability to continue providing an effective and economical service are so critical, we think a conservative approach is required by the public interest. In our opinion, it would be more realistic to forecast 1960 traffic by assuming no growth for 1958, and 8 to 12 per cent growth for 1959 over 1957 (recognizing that 1958 was abnormally depressed), and a 7 to 10 per cent growth for 1960, together with a 5 to 10 percent jet stimulation factor for

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1960. The resulting range (from 303,000 to 339,000) leaves room for differences in judgment, but not even at the top of the range could three carriers be economically supported. If the more conservative approach we suggest were taken, in light of all the circumstances, the market would be marginal for even two carriers to provide a satisfactory year-round pattern of jet schedules.

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3. There is no reliable evidence with respect to the impact of turbine aircraft in this market.

The record is fatally deficient, since it contains no reliable evidence with respect to the operating and economic impact of jet aircraft in this market. Therefore, it is impossible for the Board to intelligently determine the effect of high-speed, huge-capacity jet aircraft on traffic, schedules, fares, load factors, and costs. The majority was forced to concede that the record was deficient in this respect, stating, "While we agree with United and TWA that it may be preferable if data based on actual operating experience of jet aircraft were in the record, we do not believe its absence is fatal, or requires us to delay authorizing a service we have found required." The majority then concluded, "The fact of the matter is that the record in this case, on the basic elements of public convenience and necessity, **** is as thorough and complete as one could possibly seek." The foregoing conclusion is erroneous. The basic elements of public convenience and necessity as applied to this case are not present. In the first place, this is not the ordinary new route proceeding, since if it had been, it would not have been set down for expedited hearing. This case was given an expedited hearing primarily to enable the Board to determine whether the public convenience and necessity required a third nonstop carrier in the New York-San Francisco market if all carriers were operating turbine aircraft. It it had not been for the imminent

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inauguration of jet service, this proceeding would have taken its normal place on the Board's docket. Recently, in the Denver Service Case, the Board concluded that the public convenience and necessity did not require a third nonstop carrier. Therefore, in order to reverse the Denver Service Case, the Board must make an affirmative finding that the public convenience and necessity requires an additional nonstop carrier because of the inauguration of jet service. Such a finding cannot be made because of the serious lack of evidence with respect to the operating and economic characteristics of jet aircraft.

It is clear from Board Order No. E-12103, January 13, 1958, that it was the Board's primary intention, in prematurely setting this case for hearing, to establish "A full-scale investigation of the imminent impact of the operation of jet aircraft in a market of the size and importance of that involved here." The Board further stated:

> "It is expected, therefore, that the applicants and intervening carriers will give careful consideration in their exhibits in this case to the effects of their planned operation of jet aircraft in this market, and we direct the Examiner to make specific findings on this issue, in determining whether the public convenience and necessity requires additional nonstop service in the market in question." (Emphasis added.)

Therefore, without the specific findings of the effect of jet operations in this market, and the Examiner and the majority made none that are supported by evidence, the public convenience and

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necessity for the service cannot be determined. The only findings made by the Examiner on this issue were that jets had a huge carrying capacity, and that they might stimulate traffic as much as 10 per cent. These are not sufficient findings to support the ultimate conclusion that an additional jet nonstop carrier is required.

In order for the Board to determine whether the public convenience and necessity require a third nonstop carrier operating jet aircraft, it would be necessary, under the ground rules of this proceeding, for the Board to make specific findings based on the actual operating experience of jet aircraft as to the costs of operating such aircraft, the breakeven load factor,[6] the type of scheduling required, and the percentage that jet aircraft will or will not stimulate traffic. Because of the transition to jets, and the substantial differences in terms of speed, capacity, and their effect on maintenance, flight patterns, traffic, and the training of crews, both flight and ground, there is no way of arriving at any precise determination of costs, breakeven load factors, or traffic stimulation without actual experience. The evidence in this record will not permit such a determination, and it does not, therefore, give the Board the opportunity to critically study and analyze the impact of jet aircraft with respect to the issue of public convenience and necessity.

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[6] The majority adopts a breakeven load factor for the Boeing 707 of 54 per cent, which was suggested by the manufacturer. There is no estimated breakeven load factor for the Douglas DC-8 in the record. In any event, a manufacturer's breakeven load factor has never been considered reliable by either the carriers or the Board.

In April 1959, several of the carriers, in response to a request by the Board, submitted their views as to the many problems facing the industry with the inauguration of jet aircraft. All of the parties, without exception, unanimously agreed that there was insufficient experience to arrive at any definite conclusions with respect to the operation of jet aircraft. The following constitutes some of the specific comments made by the air carriers:

AMERICAN AIRLINES

"The foreseeable future of jet operations will be a time in which the carriers should be allowed to acquire experience and adjust to their experience by pricing experimentation."

UNITED AIR LINES

"United wishes to stress that only after the period of transition to jet operations will reliable data begin to become available on the economics of jet operations. Until such time, extreme caution must be exercised to avoid actions which may lead to permanent injury to the economic soundness of the industry."

TRANS WORLD AIRLINES

"A substantial period of transition lies ahead: Some carrier must be first with jets, some carrier must be last. With the interlaced network of competitive routes existing, the early recipients of jets will benefit at the expense of their competitors with later delivery dates. It will be a period of severe stress for a substantial part of the industry.

"There are many elements of jet operations for which costs are in excess of those anticipated. Whether jet operations will later produce economies that will offset these higher costs is at least uncertain and unlikely to be resolved in the transition period."

NORTHWEST AIRLINES

"Of critical significance **** will be the transition period covering the inauguration and subsequent broadening of the base of commercial jet air service. This period, which will encompass the

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remainder of 1959 and at least all of 1960, will be most difficult with respect to proper determination of jet fares because of:

1. The absence of sufficient experience by which to determine actual normal operating costs of wholly new aircraft types -

2. The unknown factor of traffic response to a broader pattern of jet services then exists at the present time -

3. The unknown impact of turbo-jet services upon the remaining turbo-prop and piston engine services of the carriers - "

BRANIFF AIRWAYS

"We respectfully request that the Board use care in applying the limited actual jet experience which is available to prospective conditions throughout the industry, and particularly to Braniff. There is reason to believe that jet costs will increase substantially as operating stage lengths are reduced, and that present passenger enthusiasm will wane as jet service is expanded to additional markets."

DELTA AIR LINES

"It now seems clear that the initial period of pure jet operations will be more costly than later periods as a result of the following factors:

1. Aircraft utilization will be lower in the initial period;
2. Ground facilities and equipment necessary for jet operations will receive relatively less use, and therefore result in higher unit costs, in the early period of jet operations;
3. Pre-operating costs will be greater for jet aircraft than for any other new type of equipment previously placed in service by Delta, and amortization of these pre-operating charges in accordance with established practice will produce additional charges against operations in the early years of jet operations; and

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4. Delta will also be faced with the high costs of a 'learning period' operation during which all personnel, especially in flight operations, maintenance, overhaul and stations, must develop new skills."

CONTINENTAL AIR LINES

"The transition that the airline industry is facing is of such a nature that we cannot predict with any degree of preciseness what cost problems will be encountered in the foreseeable future. The tremendous differences in terms of speed, capacity, and their effect on maintenance, flight patterns, training of crews and ground personnel, preclude arriving at precise estimates of costs without practical experience."

In addition, the Board realizing the tremendous operating and economic problems associated with the inauguration of jet operations, instituted on September 5, 1958 a broad study of the probable effects of the industry's acquisition of jet aircraft on the Board's economic regulatory program. The purpose of this study is to enable the Board to develop an insight into the probable effects of conversion to jet aircraft, to aid the Board in planning and carrying out an effective economic regulatory program related to the development of the jet operations. The principal elements of the study are to be (1) forecasts of traffic volume and related revenues; (20 estimates of unit operating costs; (3) evaluation of the prospects of the carriers for percentage subsidy-free operations under the revenue and cost conditions anticipated; and (4) study of actions the Board might take concerning route structures, fares, classes of service, etc., to facilitate the development of profitable jet operations. This study has not been completed, and until it has been, the Board should not

now authorize additional competition over competitive routes where the competing carriers have definite plans to operate jet equipment. The existing carriers should be given the opportunity to inaugurate their jet flights without excessive competition.[7/]

4. Diversion would be substantial and unwarranted.

The majority apparently are not concerned with the substantial amount of revenues that will be actually diverted from United and TWA, an amount conceded to be by all parties approximately $12,000,000.[8/] This is substantial diversion, per se. It represents over three per cent of TWA's 1958 domestic passenger revenues and two per cent of United's, the largest percentage diversion ever involved in a new route award between only one pair of cities. Diversion in this amount and its effect cannot be ignored by the Board.

Diversion is always an important element of the public convenience and necessity, and must be carefully weighed by the Board in determining whether a new service is justified. Substantial diversion becomes a deciding factor when it adversely affects the financial well-being of existing carriers or when there is a lack of public need for the proposed duplicating service. Such diversion is of overwhelming significance where, as here, contrary to the pattern of most Board decisions authorizing additional competition, a stronger carrier is being certificated into markets of weaker carriers. It is our opinion that since there is a lack of public need for the proposed service and no public injury if the proposed service is not authorized, that diversion in this amount is sufficient to outweigh any alleged benefits. As hereinbefore shown, all the evidence conclusively shows that the existing carriers are now providing, and will continue to provide, more than adequate service in the New York-San Francisco market.

Additionally, and most important, the majority fails to discuss the possible effect that diversion, in the amount of $12,000,000, will have upon passenger fares. The Board, in the *General Passenger Fare Investigation*, Docket 8008, must determine whether there should be an increase in fares over the level in existence on February 9, 1958. If the evidence in that case indicates that fares should be increased, the amount of the increase will depend upon the earning prospects of the industry. If a third nonstop carrier is authorized between New York and San Francisco, industry profits will be reduced by up to $12,000,000, and this reduction will be compensated in the form of increased fare

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7/ Dissent, *Great Lakes-Southeast Service Case*, Docket No. 2396, decided September 30, 1958

8/ The $12,000,000 majority diversion estimate assumes that American will capture only 30 per cent of the market. This conclusion is not supported. Even American forecast that it would capture a larger share of the market. On the basis of New York-Los Angeles experience, we think American will capture more than 33 per cent of the market.

levels for which the public gets little or nothing in return.

[4782]

In conclusion, based upon this record, we would not authorize a third nonstop carrier between New York and San Francisco at this time. Instead, we would deny the applications for such service, or, in the alternative, defer decision until such time as the Board has substantial, reliable and probative evidence of the economic and operating effects of jet aircraft as specifically applied to this market.

/s/ JAMES R. DURFEE
/s/ HARMAR D. DENNY

[4783]

APPENDIX A

DOCKET NO. 9214

THE EXAMINER'S INITIAL DECISION REFERRED TO HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION GIVEN AT THE TIME OF ITS RELEASE. THE INITIAL DECISION IS ATTACHED TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES IN THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

APPENDIX B
Page 1

ESTIMATED DIVERSION IN NY-SFO MARKET FOR CALENDAR YEAR 1960

	American	United	Trans World	Total
A. (1) Passengers carried on through-plane services March 1-14 and Sept. 17-30, 1957 a/	730	9,662	8,715	19,107
% each carrier of total	3.8	50.6	45.6	
B. (1) Estimated 1957 non-stop potential (number of passengers) b/	9,500	126,500	114,000	250,000
C. (1) Estimated 1960 non-stop market (1957 X 133.1% X 110.0%) c/	-	-	-	366,025
(2) Distribution if American's application is denied d/	13,909	185,209	166,907	366,025
(3) Distribution if American's application is granted e/	109,808	134,770	121,447	366,025
D. (1) Diversion computation: Net change between C-2 & C-3	+95,899	-50,439	-45,460	-0-
Average yield per passenger between LGA and SFO f/	$135.50	$135.50	$135.50	
Gross passenger revenue change	+$12,994,315	-$6,834,485	-$6,159,830	-0-
(2) Growth-offset theory: Net change between B-1 and C-3	100,308	8,270	7,447	116,025
Gross increase in passenger revenue g/	$13,591,734	$1,120,585	$1,009,069	$15,721,388

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a/ As shown in exhibit U-C of United and AA Response-14 of American. Trans World data obtained by a 14-day allocation of the number of passengers shown in TWA-35.

b/ This total allocated to each carrier by percentage distribution in "A" above.

c/ Increase of 10% per year to account for normal growth, plus a 10% increase to account for the traffic stimulus due to jet service.

d/ Assuming share of nonstop potential will remain the same as in 1957.

e/ Assuming American will obtain 30% of the nonstop potential and United and Trans World will divide the balance in accordance with their present ratio to each other.

f/ Average of coach and first-class fares.

g/ Net increase in passengers X $135.50.

[4786]

Order No. E-14412

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C., on the
2nd day of September, 1959

ORDER

A public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That an amended certificate of public convenience and necessity in the form attached hereto be issued to American Airlines, Inc., for route No. 4.

2. That said amended certificate shall be signed on behalf of the Board by its Chairman, shall have affixed thereto the seal of the Board attested by the Secretary, and, subject to the extension of its

effective date in accordance with the provisions of said amended certificate shall be effective on November 1, 1959.

3. That the motion to reopen the record filed herein by United Air Lines, Inc., be and it hereby is denied.

4. That, except to the extent granted herein, all applications in this proceeding be and they hereby are denied.

By the Civil Aeronautics Board:

/s/ Mabel McCart
Acting Secretary

(SEAL)

[4787]

Issued pursuant to
Order No. E-14412

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended)

for Route No. 4

- - - - - - -

AMERICAN AIRLINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the terminal point Los Angeles, Calif., the intermediate points San Diego, Calif., Phoenix, Tucson, and Douglas, Arix., El Paso, Tex., and beyond El Paso, Tex., the intermediate points (a) Oklahoma City and Tulsa, Okla., and Nashville, Tenn., or (b) Midland-Odessa, (to be served through Midland Army Air Field), Big Spring, Abilene, Forth Worth, and Dallas, Tex., Texarkana and Little Rock, Ark., Memphis and Nashville, Tenn., and

(a) beyond Nashville, Tenn., the intermediate points Louisville, Ky., and Cincinnati, Ohio, and (i) beyond Cincinnati, Ohio, the intermediate points Dayton, Columbus, and

Akron, Ohio, and the terminal point Cleveland, Ohio, and (ii) beyond Cincinnati, Ohio, the intermediate points Columbus, Ohio, Pittsburgh, Pa., and the coterminal points New York, N. Y., and Newark, N. J.,

(b) beyond Nashville, Tenn., the intermediate points Louisville, Ky., Cincinnati, Ohio, Huntington, Charleston-Dunbar, Parkersburg, Clarksburg, and Elkins, W. Va., Washington, D. C., Baltimore, Md., Wilmington, Del., Philadelphia, Pa., Newark, N. J., New York, N. Y., Bridgeport, New Haven, and Hartford, Conn.-Springfield, Mass., Providence, R. I., and the terminal point Boston, Mass.,

(c) beyond Nashville, Tenn., the intermediate points Knoxville, Tenn., Bristol, Roanoke, Lynchburg, and Richmond, Va.,

Washington, D. C., Baltimore, Md., Wilmington, Del., Philadelphia, Pa., Newark, N. J., New York, N. Y., Bridgeport, New Haven, and Hartford, Conn.-Springfield, Mass., Providence, R. I., and the terminal point Boston, Mass.;

2. Between the coterminal points San Francisco and Oakland, Calif., the intermediate points Phoenix, Tucson, and Douglas, Ariz., El Paso, Tex., and beyond El Paso, Tex., the intermediate points (a) Oklahoma City and Tulsa, Okla., and Nashville, Tenn., or (b) Midland-Odessa (to be served through Midland Army Air Field), Big Spring, Abilene, Fort Worth, and Dallas, Tex., Texarkana and Little Rock, Ark, Memphis and Nashville, Tenn., and beyond Nashville, Tenn., as described in "1" (a), (b), and (c) above;

3. Between the terminal point Milwaukee, Wis., the intermediate points Chicago, Peoria, and Springfield, Ill., St. Louis, Springfield, and Joplin, Mo., Tulsa and Oklahoma City, Okla., Dallas, Fort Worth, Abilene, Big Spring, Midland-Odessa (to be served through Midland

Army Air Field), and El Paso, Tex., Douglas, Tucson, and Phoenix, Ariz., and (a) beyond Phoenix, Ariz., the intermediate point San Diego, Calif., and the terminal point Los Angeles, Calif., and (b) beyond Phoenix Ariz., the coterminal points Oakland and San Francisco, Calif.;

4. Between the terminal point Houston, Tex., the intermediate points Nashville, Tenn., Columbus, Ohio, and Pittsburgh, Pa., and the coterminal points New York, N. Y., and Newark, N. J.

The service herein authorized is subject to the following terms, conditions and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate; and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points prior to the effective date of this certificate. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein, other than a point required to be served through an airport named herein, through any airport convenient thereto, and

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render scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby.

(3) The holder shall serve Milwaukee, Wis., only on flights originating or terminating at St. Louis, Mo., or a point west thereof.

(4) The holder shall serve San Diego, Calif., only on flights

originating or terminating at Phoenix, Ariz., or a point east thereof.

(5) Except with respect to nonstop flights scheduled between San Francisco or Oakland, Calif., on the one hand, and New York, N. Y., or Newark, N. J., on the other hand, the holder shall serve San Francisco and Oakland, Calif., only on flights serving Dallas, Tex., Tulsa, Okla., or a point west of either thereof other than San Francisco or Oakland, Calif.

(6) The holder shall not render nonstop service (a) between Cincinnati, Ohio, and Philadelphia, Pa., and (b) between Charleston, W. Va., and Philadelphia, Pa., Newark, N. J., or New York, N. Y., and (c) between New York, N. Y., Newark, N. J., or Philadelphia, Pa., on the one hand, and Clarksburg, Elkins, Parkersburg, or Huntington, W. Va., on the other hand.

(7) Flights serving Dayton or Columbus, Ohio, on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve Nashville, Tenn.

(8) Flights serving Louisville, Ky., on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve (a) Nashville or Memphis, Tenn., or Dallas, Tex., or (b) Tulsa or Oklahoma City, Okla., and at least one additional intermediate point west of Tulsa.

(9) Flights serving Cincinnati, Ohio, on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve (a) Nashville or Memphis, Tenn., Dallas, Tex., or Chicago, Ill., or (b) Tulsa or Oklahoma City, Okla., and at least one additional intermediate point west of Tulsa.

(10) Flights serving Louisville, Ky., on the one hand, and Huntington and Charleston, W. Va., Washington, D. C., Baltimore, Md., or Wilmington, Del., on the other hand, shall also serve Cincinnati, Ohio.

(11) Flights serving Louisville, Ky., on the one hand, and Philadelphia, Pa., on the other hand, shall serve Cincinnati, Ohio,

and one intermediate point between Cincinnati, Ohio, and Philadelphia, Pa.

[4790]

(12) Flights serving Louisville, Ky., on the one hand, and New Haven and Hartford, Conn.-Springfield, Mass., Providence, R. I., and Boston, Mass., on the other hand, shall also serve both Cincinnati, Ohio, and one of the following points: Washington, D. C., Baltimore, Md., Wilmington, Del., Newark, N. J., or New York, N. Y.

(13) Flights serving Charleston, W. Va., on the one hand, and New Haven, Conn., Hartford, Conn.-Springfield, Mass., Providence, R. I., or Boston, Mass., on the other hand, shall also serve one of the following points: Washington, D. C., Baltimore, Md., Wilmington, Del., Newark, N. J., or New York, N. Y.

(14) Flights serving Nashville, Tenn., on the one hand, and Charleston, or Huntington, W. Va., on the other hand, shall also serve Cincinnati, Ohio.

(15) Notwithstanding the linear route description in this certificate, the holder may serve the coterminal points San Francisco and/or Oakland, Calif., on the one hand, and Phoenix, Ariz., and points east thereof, on the other hand, on flights carrying property and mail only, which also serve the intermediate points Los Angeles and/or San Diego, Calif.: Provided, That on such flights the holder shall not discharge at Los Angeles or San Diego property or mail which was enplaned in San Francisco or Oakland and shall not discharge at San Francisco or Oakland property or mail which was enplaned in San Diego or Los Angeles.

(16) The holder's authority to serve Huntington, W. Va., is suspended.

(17) The holder's authority to serve Texarkana, Ark., is suspended for the period during which Trans-Texas Airways is authorized to serve such point.

(18) Flights serving Houston, Tex., shall also

serve Pittsburgh, Pa.

(19) Flights serving Pittsburgh, Pa., shall (a) also serve at least one of the following points: Memphis and Nashville, Tenn., Tulsa and Oklahoma City, Okla., Fort Worth, Dallas, and Houston, Tex., and (b) originate or terminate at (i) Tulsa, Okla., or Dallas, Tex., or a point west of either such point, or (ii) Houston, Tex.

(20) Flights serving Columbus, Ohio, on the one hand, and New York, N. Y., or Newark, N. J., on the other hand, shall also serve at least one of the following points: Memphis and Nashville, Tenn., Tulsa and Oklahoma City, Okla., Fort Worth, Dallas, and Houston, Tex.

The exercise of the privileges granted by this certificate shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

The authority in "(15)" above shall expire on August 11, 1954, or upon the date the temporary certificates of public convenience and necessity issued pursuant to the Board's Order Serial No. E-3085, dated July 29, 1949, otherwise cease to be effective, whichever shall first occur.[1]

This certificate shall be effective on November 1, 1959: Provided, however, That prior to the date on which this certificate would otherwise become effective the Board, either on its own initiative or upon the timely filing of a petition or petitions seeking reconsideration of the Board's order of September 2, 1959 (Order No. E-14412) insofar as such order authorizes the issuance of this certificate may by order or orders extend such effective date from time to time.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman, and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on the 2nd day of September, 1959.

/s/ James R. Durfee
Chairman

(SEAL)
ATTEST:
/s/ Mabel McCart
Acting Secretary

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[1] American Airlines, Inc., has filed an application on February 8, 1954, Docket No. 6541, for continuation of the authority in "(15)" above.

[4793]

PETITION FOR RE-HEARING AND RECONSIDERATION OF ORDER NO. E-14412

* * * *

[4794]

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  D. The participation of Member Hector in the Board's decision vitiates it . . . . [4806]

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Scope of the relief requested . . . . [4817]

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Attachments

Note: In the lower left hand corner of each attachment there appears a number, presumably affixed by the Docket Section to indicate the order in which the documents appear in the Board's correspondence files. In the interests of logical chronology this order has in general been reversed in the attachments.

[4795]

* * * *

Trans World Airlines, Inc., a party to the above-mentioned proceeding, hereby requests that the Board reconsider Order No. E-14412, and upon such reconsideration:

(1) Vacate said order in its entirety; or

(2) Stay the effectiveness of said order and reopen the case for further proceedings directed to the issues posed infra in this petition.*

In order that TWA may not be subjected to the irreparable injury threatened by said order, or, if so threatened, may seek appropriate court relief under Section 1006 of the Act, TWA asks that a decision on its petition be expedited, so that TWA may be advised at least ten days prior to November 1, 1959, the date upon which the order would now become effective, of the Board's decision.

In support of its requests for relief, TWA urges (1) that TWA has been denied fair hearing; (2) that the Board's order does not contain adequate findings supported by substantial evidence; and (3) that the Board has failed to apply the requisite standards of Section 401 of the Act.

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* The scope of the relief requested is discussed more fully at the conclusion of this petition.

[4796]

I

TWA HAS BEEN DENIED FAIR HEARING

The record in this proceeding, and certain matters not previously of record, establish that TWA has been denied a fair hearing in this proceeding in the following respects:

A. As shown by the attachments hereto, throughout the proceedings the Board has been subjected to and has participated in ex parte communications and contacts with persons supporting the applications for additional service.

B. Many, if not all, of these ex parte communications were authored, inspired or solicited by parties adverse to TWA.

C. The Board failed to follow its own rules of procedure and practice.

D. The participation of Member Hector in the Board's decision, without hearing the oral argument, vitiates it.

E. The ex parte oral argument granted San Francisco on December 2, 1957 substantially violates TWA's right to due process.

F. Denial of the production of the staff report constitutes fatal error.

G. The Board erred in refusing to reopen the record.

H. The Board adopted a fatally deficient Initial Decision.

A. Throughout the Proceedings the Board Has Been Subjected to and Has Participated in Ex Parte Communications and Contacts with Persons Supporting the Applications for Additional Service.

Attached hereto and made part hereof are exact copies of over 200 ex parte communications between various persons and

the Board or individual members thereof. The communications directed to the Board or its members bear upon virtually every issue, procedural and substantive, involved in this proceeding and extend in point of time from a few days after the filing of American's motion for an expedited hearing (the first step in the case) until several days after the case stood submitted following oral argument. Without exception these communications are adverse to the interests of TWA in this proceeding and were not, of course, served upon it. They first came to the attention of TWA when, following oral argument, it caused a search to be made of the Board's correspondence file.* This search was not completed until after announcement of the Board's tentative decision. While this compendium of ex parte submissions is staggering in volume, it is still incomplete in several respects:

(1) Certain of the attachments affirmatively point to the existence of other communications, written or oral, between the authors thereof and the Board or members thereof (See, e.g., letter of May 21, 1957 of Congressman Scudder; Congressman Shelley's letter of June 12, 1957; Congreeman Ray's letter of June 20, 1957; Congressman Johnson's letter of February 16, 1959).

(2) Certain of the attachments indicate that matter sent to the Board was later returned, sometimes at the request of the sender (See e.g., letter of Congressman Smith of June 10, and acknowledgment thereof on June 14, 1957; Congressman Hillings' letter of June 10 and acknowledgment of June 24, 1957; Congressman Gubser's letter of November 27 and acknowledgment of December 6, 1957; Congressman Sheppard's letter of November 29 and

acknowledgment of December 11, 1957; Congressman Mailliard's letter of June 27, 1958 (enclosures not found in files); letter of Senator Engle of February 3, and acknowledgment of February 13, 1959; letter of Congressman Younger of February 3, and acknowledgment of February 17, 1959; letter of Congressman Addonizio of March 23 and acknowledgment of March 30, 1959).

(3) The service sheet of Order No. E-11493, ordering a staff study of the issues raised by American's motion, indicates service upon Andrews Travel Agency, Berkeley, California. While no communication from that source was found in the files, inquiry has

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* Throughout its history the Board has taken the position that this file is not part of the record; and in view of the manner in which it is compiled, it could not, in any event, properly be considered so.

established that in 1957 Mr. E. G. Andrews of that agency wrote a letter "to Washington" supporting American's motion.

(4) It would appear from the attachments that in many instances each member of the Board received identical *ex parte* communications, but only one or two of such communications have been found in the correspondence file.*

It also appears that the correspondence file was not kept current. Certain communications to Member Hector in May-June, 1957 were found in Docket 9214, a proceeding not created until January, 1958.

Discussion of the legal significance of these communications follows the statement of additional facts set forth immediately below in Part B.

B. Many, if not All, of the Ex Parte Communications Were Authored, Inspired or Solicited by Parties Adverse to TWA

On May 7, 1957, the City and County of San Francisco became a party to the predecessor docket (Docket No. 5903) by filing a formal answer in support of American's motion for an expedited hearing. It has remained an active party throughout the proceedings in Docket Nos. 5903 and 9214. Several of the *ex parte* communications hereto annexed are signed by Mayor Christopher of the City and County of San Francisco. (May 15, 1957; May 21, 1957; May 23, 1957; May 29, 1957; June 24, 1958).

Further, the attachments show, in part at least, the Mayor's active role in inspiring members of Congress and others to communicate with the Board in support of American's application. An added copy of his letter to the Board of May 29, 1957 was sent to the Board by Senator Kuchel. A copy of his letter to the Board of July 3, 1957* was received from Congressman Younger. Congressman Teague wrote to the Board on November 25, 1957 asking for an immediate hearing on American's proposal after discussing the matter with Mayor Christopher. Congressman Allen on November 25, 1957 forwarded the Board a "fact sheet" he had received from Mayor Christopher, and a similar "fact sheet" was received from Congressman Baldwin and from Presidential Assistant Sherman Adams, which had been forwarded to him by one Mr. Hugh Gallagher, of the Mayor's Committee for Shipping, etc. of San Francisco. Added copies of Mayor Christopher's telegram of June 24, 1958 to the Board were received from Senator Knowland and Congressman Shelley; and Senator Engle sent to the Board on February 3, 1959 a letter he had received from Mayor Christopher, as did Congressman Younger.

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* In addition, the Board's correspondence file contains a small number of routine types of complaints from members of the public, which have not been reproduced.

The Port of New York Authority enlisted the support of Senator Ives (letter of June 4, 1957), Congressmen Kean and Widnall (June 11, 1957), Congressman Osmers (June 20,

1957), Congressman Becker (June 13, 1957), Senator Javits (June 12, 1957), Congressman Bosch (June 26, 1957) and Senators Javits and Keating (April 28, 1959) by providing them with copies of its submissions in the proceedings in support of a third New York-San Francisco nonstop carrier.

American's activities in this connection are only partly reflected in the attachments and in the record. It has already been brought to the attention of the Board in United's petition for reconsideration of Order No. E-12103, and again in oral argument (Tr. 188-189), that Mr. C. R. Smith, president of American, appeared in San Francisco in

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* This letter was originally sent *ex parte* to the Board. At the insistence of the Chairman it was later made a part of the record as a petition for reconsideration of the Board's original denial of American's motion.

November, 1957 and urged the civic leaders of that city to "keep hammering" at the Board for early authorization of American's service, because a review by the Board of the previous denial of American's motion was imminent. American must, therefore, share the responsibility for the outburst of ex parte representations which followed almost immediately.* Within a short time, the City engaged a "lobbyist" who, with another representative of the City, went to Washington to "pressure" the Board, directly and through members of Congress, for immediate hearing. (Transcript of Oral Argument of December 2, 1957, pp. 3-5)

Beyond this there appear such significant references in the attachments hereto as Congresswoman St. George's letter of June 21, 1957 ("I have received a copy of American's motion"), Congressmen Fino's and Gwinn's echoing of American's arguments (letters of June 12, 1957) and the fact that, despite both Northwest's and American's status as applicants, all of the ex parte communications that mention a carrier refer

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* The status of the proceeding at that point called for no submissions by the parties; the Board was, as shown by the record, awaiting a staff study before deciding whether to reverse its previous denial of American's motion.

solely to American's proposal (Senator Case - March 3, 1959; Congressman Derounian - March 23, 1959; Congressman Addonizio - March 23, 1959; Congressman Rooney - April 3, 1959; Congressman Moss - April 29, 1959; Congresswoman St. George - April 22, 1959; Congressman O'Brien - April 29, 1959; Congressman Osmers - April 28, 1959; Congressman Wainwright - April 28, 1959; Congressman Anfuso - April 28, 1959; Senators Javits and Keating - April 28, 1959; Congressman Sisk - April 29, 1959; Seantor Keating - April 30, 1959; and Senator Case - May 7, 1959.)

Moreover, TWA is prepared to establish upon any reopening by the sworn testimony of the authors that the following additional ex parte communications to the Board, sent directly or through a member of Congress, were solicited by employees of American:

(1) A certain letter, present whereabouts unknown, from one Mr. E. G. Andrews of the Andrews Travel Agency, Berkeley, California, dated in 1957, advocating an immediate hearing (noted above);

(2) The letter from R. John Charles, Jr. of the Charles Travel Agency, Stockton, California of May 22, 1957;

(3) The letter (attached) from Merrit Greene, of Travel Advisors, San Jose, California, dated May 22, 1957;

(4) The telegram from Patrick Mitchell, Contra Costa Travel Service, Concord, California, dated in May, 1957 (forwarded by Congressman Baldwin);

(5) The letter written by Rona Travel Service, Inc., Passaic, New Jersey (forwarded by Senator Case on March 3, 1959);

(6) The telegram sent by the Conn Travel Bureau (forwarded by Senator Case on May 7, 1959);

(7) The letter written by World View Tours, Inc., (forwarded by Congressman Derounian on March 23, 1959);

(8) The letter written by The Manno Travel Agency (forwarded by Congressman Addonizio on March 23, 1959); and

(9) The letter written by Terri Pollack, Vice President, Penthouse Travel Center, Inc. (forwarded by Congressman Rooney on April 2, 1959).

It also appears that at least one, and possibly two, ex parte communications were brought to the attention of the Examiner. A copy of the Board's acknowledgment of Congressman Cohelan's letter of February 9, 1959 pressing for an early and favorable Initial Decision on American's application was sent to the Examiner. Whether the letter itself was also brought to his attention does not appear, but he could hardly have been oblivious of its import when he received the answer thereto. This incident preceded by about a month the rendition of the Initial Decision recommending grant of American's application.

The law with respect to the factual situations outlined in Part A, *supra* and the instant part, if ever in doubt, has been made abundantly clear by a recent series of cases in the Supreme Court and the Court of Appeals for the District of Columbia Circuit. *WKAT, Inc. v. Federal Communications Commission*, 258 F.2d 418 (1958); *Sangamon Valley Television Corp. v. U.S.*, 358 U.S. 49 (1958); *WORZ, Inc. v. Federal Communications Commission*, 358 U.S. 55 (1958); *Massachusetts Bay Telecasters, Inc. v. F.C.C.*, 261 F.2d 55 (1958); *Sangamon Valley Television Corp. v. U.S.*, Case No. 13,992, U.S. App. D.C., decided May 8, 1959. Applying to administrative proceedings the rule of *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514 (1948), these cases require that the agencies adhere strictly and solely to "the recognized and public processes of ajudication" in carrying out their ajudicatory and, in some instances, their rule-making functions. Exactly as courts, the agencies must not only be scrupulously fair but also carefully maintain all the appearances of being so; and the reception of *ex parte* submissions cannot be harmonized with these vital objectives. The cases have condemned in particular the authoring, soliciting or inspiring of *ex parte* communications by parties. See *Massachusetts Bay Telecasters, Inc. v. F.C.C.*, *supra*, at pp. 66-67.

It is evident that, in a volume far surpassing that disclosed in any of the F.C.C. cases just mentioned, the present record contains *ex parte* communications falling outside the "recognized and public processes of ajudication," many, if not all, of which were inspired by parties to the proceeding. The fact that some of these are directed to the issue of whether American's application should be heard out of order, rather than to the basic issue of whether the application should be granted or denied does not alter their objectionable character, because obviously the hearing was the sine qua non of the eventual grant.* The situation is, therefore, analagous to Sangamon, where the party found principally responsible for the ex parte communications could not hope to benefit immediately from the rule-making proceeding there involved, but, without a favorable outcome of the rule-making proceeding, could not hope to prevail in a later ajudication proceeding.

That these ex parte communications to the Board and its members were calculated to influence the Board's judgment, first with respect to a decision on the adversary motion for expedition and, later, upon the basic issue posed by the proceeding, is evident not only from their plain context but also from the identity of the senders. Included were 37 Congressmen, nine Senators, two Governors, a Lieutenant Governor, two Presidential Assistants, the chief officer of the San Francisco Labor Council, numerous Chambers of Commerce officials, a member of the executive committee of the Republican National Committee, the president of the California Republican Assembly and the Chief Clerk of the California Assembly. Not one of these persons appeared at the hearing.*

Equally reprehensible are the inspired communications from travel agents proferring evidence with respect to the adequacy of service and the public demand therefor. Over the objections of TWA and United the situs of the hearing was moved completely across the continent to San Francisco to receive the testimony of such witnesses.

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* It is not without significance that the same three members who found an urgent need for immediate hearing found also an urgent need for the granting of American's proposal, on the basis of a record which, by the majority's own decision, is lacking in factual detail with respect to the central issue - the economic impact of jet operations.

The authors of the ex parte communications did not testify at that time nor at the further hearings in Washington. TWA's right to cross-examine or to offer rebuttal evidence was thus effectively foreclosed.

Also of significance is the timing of the ex parte submissions. Each time that the proceeding reached a decisive phase in any aspect, numerous communications were received by the Board. In the interludes between such phases, virtually no ex parte activity appears.

C. The Board Failed to Follow its Own Rules of Procedure and Practice.

The same facts set forth in Parts A and B and certain other facts of record disclose multiple instances of violations of the Board's own rules of procedure and practice. Most basically, of course, the Board failed the enforce the

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* Mayor Christopher appeared at the hearing and disavowed any special competence in air transportation matters (R. 7, 9).

plain mandates of Part 300.2(a)* and (c).**

Beyond this, Part 302 was not observed in several respects. First, the only authority for the filing of American's motion to hear its application out of order lies in Rule 18, a rule which spells out the complete procedures with respect to motions. Provision is made for answers within seven days (or such other period as the Board or Examiner may fix) by any party, either in support of or in opposition to the motion, and "no oral argument will be heard on motions unless the Board . . . otherwise directs." Here the Board received documents in support of American's motion long beyond the period fixed.*** These were acknowledged by the Board with assurances that they would be given careful consideration (e.g., letter of Chief Examiner Brown to the Chief Clerk of the Assembly of the California Legislature, dated June 25, 1957).**** Also, after the Board ordered a staff study of the issues raised by American's motion it continued to receive documents in support thereof and, as more fully discussed hereinafter, afforded ex parte oral argument thereon to the representatives of one of the parties (the City and County of San Francisco). No part of such procedure is sanctioned by Rule 18.

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* "It is improper that there be any private communication on the merits of the case to a member of the Board or its staff . . . by any person, either in private or public life, unless provided by law."

** "It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board . . ."

*** The time for answer was extended by the Board to May 28, 1957.

**** The fact that the Board's order of June 26, 1957 purported to deny the motion of American does not remove the prejudice to TWA and United of this failure to observe the rules. The "denial" amounted only to a deferral of decision.

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There are also indications that certain documents were given status as part of the record in violation of the Board's rules (e.g., ex parte submission of California Assembly Joint Resolution No. 33, sent to the Board on June 17, 1957 and acknowledged by the Chief Examiner on June 25, 1957 - "this resolution has been incorporated into the formal docket"; letter of Governor Brown of April 9 and acknowledgment of April 15, 1959; letter of Senator Engle of April 24 and acknowledgment of April 29, 1959). While the latter two submissions were tendered under Rule 14, that rule provides that only persons who have testified at the hearing may file written statement s with the Examiner or the Board, at the time of exchange of briefs and with service upon all parties. None of these qualifications was met.*

In receiving copious ex parte material, the Board also violated Rule 24 (j) ("no document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the Examiner").

The Sangamon case supra and cases footnoted therein hold that these failures to abide by the procedural rules amount to legal error wholly separate from that inherent in receiving ex parte submissions.

D. The Participation of Member Hector in the Board's Decision Vitiates It.

In the 3-2 division of the Board, Member Hector's vote is obviously decisive. Member Hector, however, did not hear oral argument.

The decision of the Court of Appeals for the District of Columbia Circuit in W.I.B.C., Inc. v. Federal

Communications Commission, 259 F.2d 941 (1958), is under these facts controlling. In that case, as here, the Commission divided 3-3, whereupon Commissioner Craven, who had not heard oral argument, cast the deciding vote. The order was set aside on that ground.

Although the statute in that case (47 U.S.C. 409(b)) required the Commission to "hear" oral argument, whereas Section 1004(b) requires that the Board "hear or receive" argument, it is patent that in this case the Board determined to "hear". Thus the notice to all parties of April 3, 1959 states:

> "Oral argument . . . has been assigned to be heard . . ."

(Emphasis supplied)

And at the outset of the argument, Chairman Durfee stated:

> "The Board will now hear oral argument . . ."

(Emphasis supplied)

No notation of Member Hector's intention to participate in the decision, even though absent, was made. TWA, therefore, did not waive in any degree its right to oral argument before those who would

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* Nonetheless, the Board's acknowledgment states that these documents are being incorporated in the formal docket.

decide the issues. In this respect the case is plainly distinguishable from Sisto v. Civil Aeronautics Board, 179 F.2d 47 (1949)* and from McGraw Electric Co. v. U.S., 120 F.Supp. 354 (1954).

Also plainly distinguishable is Eastland Co. v. Federal Communications Commission, 92 F.2d 467 (1937). In that case, death of one division member and the transfer of another had made them unavailable when decision was reached, circumstances not relevant here. Also, the Court therein pointed out that no rehearing had been requested before the Division or Commission, a further distinguishing factor.

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* The transcript of oral argument in the Sisto case before the Board (SR-1987, July 12, 1948) begins with the announcement by Acting Chairman Ryan that the two unavoidably absent members intended to participate in the decision on the basis of a review of the transcript. No objection was lodged.

Having determined to hear oral argument, the Board was required to make that phase of its process a legally meaningful one. Cf. Sangamon Valley Television Corp. v. U.S., Case No. 13992, U.S. App. D.C., decided May 8, 1959 and cases cited therein. Also, the right of oral presentation is a valuable one. Londoner v. Denver, 210 U.S. 373, 386 (1908). It would be highly illogical, therefore, to urge that the absence of a member, unexplained and without indication of his intention to participate in the decision, is unimportant when that member's vote later proves the decisive one.

In summary, Order No. E-14412, not having been adopted by a majority of the quorum of the Board present at the oral argument, is void.*

E. The Ex Parte Oral Argument Granted San Francisco on December 2, 1957 Substantially Violated TWA's Right to Procedural Due Process.

As more fully set forth in its briefs and oral argument, TWA takes the position that the Board committed fatal error in limine by permitting representatives of the City and County of San Francisco to appear *ex parte* on December 2, 1957 in support of immediate hearing and favorable action upon American's application and thereafter by denying comparable opportunity to TWA and United. The right to oral argument is a valuable one, the deprivation of which cannot be neutralized by the opportunity to submit written comments, particularly after decision has been reached. *Londoner v. Denver*, 210 U.S. 373, 386 (1908); *L.B. Wilson, Inc., v. Federal Communications Commission*, 170 F.2d 793 (1948).

Order No. E-14412 makes no notation of this assignment of error. Hence, presumably, the Board has either over-

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[*] The fact that *ex parte* communications were made to the Board members, as above detailed, serves to compound the vice of having a member who did not hear argument cast the decisive vote.

looked this point or has considered it disposed of in Order No. E-12337, where the Board stated:

> "The Board's original order and this one on reconsideration set forth the basis for the Board's decision to direct expedited proceedings on American's application. We find no basis for making . . . the transcript of the Board's meeting with representatives of the city of San Francisco . . . . a part of the record here. Nor can we find any justification for holding oral argument on the questions that have been presented. Interested persons have had ample opportunity to submit their views in writing and oral argument would serve no useful purpose."

TWA again urges that the Board's rulings in this connection are not in accord with the prevailing law and should be reappraised, particularly in the light of the Board's communications to Mr. Gallagher (December 2, 1957) Congressman Gubser (December 6, 1957), Congressman Teague (December 6, 1957), Congressman Baldwin (December 12, 1957), Congressman Moss (December 12, 1957), Congressman Allen (December 12, 1957) and Congressman Sheppard (December 11, 1957), hereto attached, all of which state in substance " . . . you can be sure that in coming to a decision on the request for an immediate hearing, the Board will weigh most carefully . . . the representations made by the city representatives."*

F. Denial of the Production of the Staff Report Constitutes Fatal Error.

Throughout the proceeding, first by request and later by attempted resort to compulsory process, TWA sought unsuccessfully to obtain a copy of the report of the Bureau of Air Operations submitted to the Board in Docket No. 5903 in December, 1957. In briefs and arguments TWA urged that denial of the production of the report was error and pointed out the numerous respects in which the report, directed, as

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* Quoted from letter to Congressman Teague.

it must have been, to the public interest considerations in added San Francisco-New York service, assumed importance to TWA's defensive interests in the proceeding.* For a discussion of the legal authorities on this question, the Board is referred to pp. 33-34 of TWA's Brief to the Examiner. Order No. E-14412 contains no ruling upon, and indeed no notation of, TWA's position in this regard.

Further in this connection, TWA calls to the attention of the Board the recent decision of Judge Holtzoff in the United States District Court for the District of Columbia in In the Matter of Boeing Airplane Company, Case No. Misc. 31-58, decided April 9, 1959. It is to be noted that this decision denies to the Air Force any privilege with respect to reports when the group within the Air Force responsible for the preparation thereof later participates in an adversary proceeding (cf. the position herein of the Bureau of Air Operations).** Moreover, the Air Force is an executive agency (as is the General Services Administration involved in Kaiser Aluminum and Chemical Corp. v. U.S., 157 F.Supp. 939 [1958]), whose claim of privilege is certainly less dubious than that of an administrative agency.

G. The Board Erred in Refusing to Reopen the Record.

The reasons assigned by the Board for hearing the present proceeding several years in advance of its regular

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turn deal largely with the prospective revolutionary impact of jet aircraft. As is now evident, however, from the Board's decision (pp. 19) 20), no data with respect to the actual performance of such aircraft are contained in the record. It is equally clear that at the time of the denial (September 2, 1959) considerable evidence could have been made available on this subject by virtue of fairly widespread operations of Boeing-707 aircraft by Pan American, National, American, TWA and Continental.

The very fact that these jet operations are revolutionary brings this case within the rule of Atchison, Topeka & Santa Fe Railway Co. v. U.S., 284 U.S. 248 (1931), treating as a denial of fair hearing the Interstate Commerce Commission's refusal to reopen to receive evidence of marked changes in conditions.*

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* The Board also considered the report an important document. Note the Board's identical statements to Senators Kuchel and Knowland in letters of November 26, 1957: ". . . the need for an early hearing will receive most careful consideration in the light of the facts developed and presented as a result of this study."

** While as noted in TWA's Brief to the Examiner, no claim of privilege was asserted, some such theory would have to be indulged in to lend any color of explanation for the refusal to produce a report analyzing the service in the very market at issue in the proceeding.

H. The Board Has Adopted the Fatally Deficient Initial Decision of the Examiner.

The majority has, in so many words, adopted (except as modified in minor aspects) the findings, conclusions and recommendations of the Examiner's Initial Decision (Mimeo. Op., p. 1). In its brief to the Board and in oral argument, TWA has pointed out that the Initial Decision was fatally defective in failing to rule on numerous important matters of fact and law asserted by TWA.** As noted in that brief, the positions advanced in TWA's 64 exhibits, 90 pages of

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* "In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right." (at p. 262)

** TWA listed in its brief to the Board (pp. 7-8) eight important issues of fact not met by the Initial Decision. While six of these are discussed by the majority in response to TWA's exceptions, two are not; and in those that are discussed, the majority almost invariably falls back upon the Examiner's conclusions as support for its rulings. But, as stated at the outset, the Examiner had formulated these conclusions while completely ignoring TWA's factual contentions.

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testimony and 37 pages of brief were formally summarized by the Examiner *in four sentences*, *one of them factually inaccurate*.

It may be true that where the agency in effect meets all the issues *de novo*, any deficiencies in the Initial Decision will not be fatal. But that is certainly not true here. Aside from the general adoption of the Initial Decision noted above, the majority *no less than thirty times* cites the Initial Decision's conclusions as authority for its rulings on particular issues, without regard for the lack of objective factual analysis disclosed by that decision.

II

THE BOARD'S ORDER DOES NOT CONTAIN ADEQUATE FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE

The dissenting opinion of Chairman Durfee and Member Denny points out many of the respects in which the majority opinion fails to include findings responsive to the evidence of record. Brief additional discussion of these failures confirms the soundness of the dissent's position that the result herein simply cannot be validly rationalized.

For example, one of the important factual issues in the proceeding is the adequacy of TWA's and United's existing San Francisco-New York nonstop services. Disregarding the unanimous evidence elicited by examination of the user witnesses that the service is in fact excellent, the majority seeks to bottom a finding of inadequacy on the substantial increases in United's and TWA's nonstop services in mid-1957. In so doing, it rejects the evidence submitted by those carriers of a temporary equipment shortage just prior thereto and ascribes the increases to the pendency of the proceeding. It states:

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> ". . . in view of the extremely large increase in nonstop schedules after the motions for early hearings in this proceeding had been filed . . . we do not believe the equipment shortage supplies the basic answer . . . . "

In effect, the majority is accepting as evidence American's argumentative hypothesis with respect to the state of mind of TWA's management in preference to the sworn testimony of the key member of that management (see testimony of E. O. Cocke, Exhibit TWA-A) and, indeed, in preference to unchallenged documentary evidence. TWA's Exhibit No. 79 shows that a firm plan for the operation of TWA's mid-1957 frequency was formulated in November, 1956, six months prior to the filing of American's motion, to become effective as soon as TWA's Lockheed 1649A (Jetstream) aircraft were delivered.

American made no effort to rebut this unequivocal proof; it merely continued to argue *upon no factual basis whatever* that the schedule increases were calculated solely to eliminate any showing of need for American's service, an argument now adopted by the majority of the Board.

Again, on the important issue of the economic feasibility of American's proposed services, the majority rejects the sworn testimony of American's senior vice president of traffic and sales (R. 572) and relies upon a wholly new theory advanced by American's counsel in brief and oral argument (Mimeo. Op., p. 11). This is upon the critical item of the foreseeable frequency of nonstop jet service in the San Francisco-New York market under a three-carrier pattern.* The plain truth is that, on the *facts* as presented by American, its proposed operations will create unsound economic conditions in air transportation in the form of load factors far below the break-even point. The majority thus finds it necessary to recast American's proposal, even though there is no power under the Act to require American to pay the slightest attention to the Board's views on the appropriate frequency in the market. Moreover, as the dissenting opinion makes plain, even as recast, American's proposal virtually guarantees excessive capacity in the San Francisco-New York market.

On this same subject of economic feasibility, the majority's inclusion in the historic traffic base of the excursion fare traffic is unsound. That traffic was not eligible for the nonstop service in the past; it is a patent statistical fallacy and, in view of the price differential, a logical fallacy as well, to assume that it was. Moreover, this is not a fare-making proceeding, and even if it were, there is no proposal herein to make available an excursion fare on non-stop jet services. Nor is there any analysis in this record of what will happen to the more localized services if excursion traffic is drained off by the nonstops.* For all these reasons, the majority's assumption that excursion fare traffic furnishes part of the justification for the carrier pattern it has created is pure conjecture.

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* American's testimony foresaw nine round trips with three carriers; its brief and argument cut the frequency to 7.5 trips. Obviously, TWA and United were foreclosed from examining American's traffic and financial witnesses on the effects of this basic change upon revenues, costs, public benefits, etc.

Fourthly, the majority's treatment of the Board's previous decision in the *Denver Service* case ignores the evidence. In the former case, an affirmative need was found for *prohibiting* American from operating nonstop services in the San Francisco-New York market. The majority does not review the evidence to determine whether the reasons for

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this prohibition have disappeared; it states merely (Mimeo. Op., p. 25) that because the restriction against such service did not prove fully effective in the interim, but may now prove so, it should be removed! No analysis is made of the effect of this action upon the policy objectives of the *Denver Service* case (competitive balance); but clearly any such analysis would have shown that, by giving American unlimited access to United's largest, and TWA's second largest, market, the majority has consigned the policy to oblivion.* Indeed the very conclusion reached by the majority (that one-stop services may no longer attract traffic) means that, more so than ever before, the failure to restrict American from full-scale participation in the San Francisco-New York market will, in the words of the *Denver Service* case, "do violence to our effort toward achieving balanced competition in our air transport system." *The majority did not, and could not,* find to the contrary.

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* The whole justification for a bargain fare would disappear if that fare would purchase the best service operated by the carrier.

Finally, and perhaps most illogically, the majority disregards its own assigned reasons for hearing the case out of its normal order. That the proceeding did not, as the majority had anticipated in prematurely hearing it, result in "a full-scale investigation of the impact of jet aircraft" is implicit in the majority's statement (Mimeo. Op., p. 20):

> "We recognize that precise accuracy in determining cost estimates of a turbine aircraft, which for the purposes of this record, is as yet unused, is unattainable. While we agree with United and TWA that it might be preferable if data based on actual operating experience of jet aircraft were in the record, we do not believe its absence is fatal or requires us to delay authorizing a service we have found required.

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* In the period since the Denver case, American has secured, inter alia, entry into Houston and Pittsburgh, improved access to Columbus and St. Louis-New York nonstop authority.

In summary, the majority is thus in a position of reversing itself upon the necessity for considering the very evidence the proceeding was designed to elicit, evidence unattainable only because the case has been prematurely heard.

III

THE BOARD HAS FAILED TO APPLY THE STANDARDS OF SECTION 401 OF THE ACT

The elements of public convenience and necessity have become well-established in the decisions of the Board and of other agencies. One of these elements is whether the proposed service can and will be provided by the existing carriers. Here, in what appears as an unprecedented decision, the majority finds that without the authorization of a third carrier the service would nonetheless be provided, but that the existing carriers should abandon their plans to provide it so that *the proposed service can be economically justified* (Mimeo. Op., pp. 11-12).* This, as the dissenting opinion notes, is added competition for the sake of added competition, a theory completely rejected by the Supreme Court in *Federal Communications Commission v. R.C.A. Communications, Inc.*, 346 U.S. 86 (1953).

In another aspect, the majority has not applied sound statutory standards. The record makes clear that any aircraft diverted to the San Francisco-New York market by American will be at the expense of other markets served by that carrier (R. 472, 585). Neither the Examiner's Initial Decision nor the majority's opinion has weighed the relative

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need of the San Francisco-New York market for the proposed service against the disadvantages to the traveling public in other markets served by American. Certainly it is no answer to say that the Board can under the Act compel adequate service by American in other markets; the Board cannot, by administrative fiat, produce the Boeing-707 aircraft to provide the services that, but for its present decision, would redound to the benefit of the traveling public in other American markets.

SCOPE OF THE RELIEF REQUESTED

The several legal errors assigned, *supra*, justify and require varying measures of relief. TWA urges that any one of them, and certainly all viewed together, dictate that Order No. E-14412 be vacated and the proceedings terminated. In the alternative, the matters set forth under Point I, Subdivisions A, B, C and E, would, under the authority of the *WKAT, WORZ, Massachusetts Bay* and

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* At the same time the majority (Mimeo. Op., p. 4) adopts the Examiner's conclusions that with "vigorous promotion" enough traffic may be developed to support three nonstop carriers, and that "vigorous competitive service" by three carriers is warranted!

Sangamon cases, require that the proceedings be reopened and begun anew with a preliminary hearing to determine the facts as to ex parte activity and its effect upon the qualifications of the applicants and the members of the Board.*

For obvious equitable reasons, the effectiveness of the Board's order must be stayed during the period required for such proceedings. As this petition shows, there are presented substantial questions of law. Also, the irreparable injury to TWA from the operation of the order (revenue loss of at least $6,000,000 annually not subject to later recoupment) has been unanimously recognized by the majority, the dissent and the Examiner. Finally, the absence of significant adverse effect upon the public is implicit in the majority's recognition that TWA and United will provide frequent jet nonstop service in the absence of American's certification. These are the traditional elements justifying a stay.

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CONCLUSION

WHEREFORE, TWA prays that Order No. E-14412 be vacated and the proceedings hereing terminated, or that, in the alternative, the Board stay said order and undertake further proceedings as above outlined.

Respectfully submitted,

/s/
Chadbourne, Parke, Whiteside & Wolff
Attorneys for
Trans World Airlines, Inc.

James K. Crimmins,
Henry P. Bevans,
Of Counsel.
New York, N.Y.,
September 21, 1959

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* While the matters set forth under Point I, Subdivision D would require only reargument, and those under Subdivisions F and G would require only limited reopening, these steps would not serve to cure the other errors. Hence, the choice of procedures lies between terminating the proceeding entirely or reopening and assigning the preliminary hearing.

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PETITION OF UNITED AIR LINES, INC., FOR REHEARING, REARGUMENT AND RECONSIDERATION

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APPENDIX A . . . . [5145]

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United Air Lines, Inc. ("United"), respectfully requests that the Board grant rehearing, reargument and reconsideration in and of the above entitled proceeding and in support thereof represents and alleges as follows:

I.

EX PARTE ATTEMPTS TO INFLUENCE THE BOARD AND ITS STAFF THROUGHOUT THIS CASE NECESSITATE A HEARING DE NOVO.

American Airlines, the City and County of San Francisco, and the Port of New York Authority have acted in gross violation of the Board's Principles of Practice and of fundamental principles of procedural due process. The Board itself has already given recognition to that fact, and as early as December 2, 1957, in a meeting with representatives of the City of San Francisco warned them of the consequences to be expected from continuation of their pressure tactics (Conference--City and County of San Francisco, R. 3). Notwithstanding this warning, the violations continued and affirmative action is now required to correct the situation created by the ex parte communications written or inspired by these parties, and their other efforts to bring pressure or influence to bear upon the members of the Board or its staff.

Section 2 of the Board's Principles of Practice does no more than state the generally accepted canons of judicial ethics. Applicable provisions thereof read as follows:

> "Par. 300.2. Hearing cases; improper influence. ****
>
> "(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the Examiner in the case by any person, either in private or public life, unless provided for by law.

* * *

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> "(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear on members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case."

Rule 14 of the Board's Rules of Practice further emphasizes the impropriety of ex parte communications by stating the specific terms under which persons not parties may participate in a hearing:

> "302.14. Participation in hearings by persons not parties. Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or of the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and

time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the federal government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned."

The known ex parte communications addressed to the Board and other efforts to bring pressure or influence to bear upon its members or its staff, fall, roughly, into five categories:

1. Communications addressed directly to the Board by parties to the proceeding for the purpose of influencing the decisions to be made by the Board on various aspects of the proceeding, consisting of letters from the Mayor and other representatives of the City of San Francisco.

2. Similar communications inspired by parties to the proceeding but written by non-parties. These include letters from the Governor and Lieutenant Governor of the State of California, from Senators representing the States of California, New York and New Jersey, from a multitude of Congressmen, from persons otherwise prominently identified with one or the other of the two major political parties, from travel agents, and from a very few ordinary individuals. They further include resolutions from a host of Chambers of Commerce, City Councils, and other municipal bodies.

3. Communications addressed to members of Congress suggesting, directly or indirectly, that such members exert influence upon the

Board or its staff in a manner other than that permitted by Rule 14 of the Board's Rules of Practice. These represent direct efforts by the Mayor and other representatives of the City of San Francisco and by the Port of New York Authority to solicit the exercise of political pressure and efforts of those parties and of American to solicit, through the medium of third parties, the intervention of members of Congress. The Board's attention is invited to Appendix A, attached hereto, which shows that evidence is available with respect to American's solicitation of support for its application through persons not parties to the case.

4. Public statements made by the interested parties, suggesting that the judgment of the Board could be swayed by political or other pressures, and that such pressures should be brought to bear upon the Board (United's Petition dated January 27, 1958).

5. Direct ex parte communication with members of the Board and its staff in a meeting ostensibly designed to do no more than discuss "general aviation problems in the City of San Francisco". However, statements made at the meeting by representatives of the City clearly indicate that it was actually intended to support American's then pending motion for an expedited hearing (Conference--City and County of San Francisco, R. 1-17). United specifically requested, but was denied, the opportunity of appearing before the Board to answer the contentions advanced by the City at that meeting (Order E-12337).

The Board's correspondence file contains 122 documents which, with only a few exceptions, fall within one or the other of the categories above listed, and United respectfully requests that these documents be made a part of the record in this proceeding. The foregoing figure is a minimum since the file discloses its own incompleteness. Furthermore, it discloses that other contacts were made in person or by telephone with members of the Board or its staff. The extent and significance of these contacts can be no more than a matter of conjecture, but they also must be considered in appraising the requirements of due process.

These ex parte communications were propitiously timed to cocide with stages in the proceeding when action by the Board, its staff or the Examiner appeared imminent. They were first sent immediately following American's filing of its motion for expedition. A second group of communications came after the Board's original denial of that motion. The third instance occurred at the time that the report of the Board's staff was due. Again, ex parte communications were sent to the Board, Congressmen and Senators when United requested an extension of the date for filing exhibits. The fifth occurrence was when the

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Examiner's Initial Decision was expected. Finally, communications of this nature appeared at the time of oral argument.

It is significant that in only a few rare instances were these ex parte communications and efforts to influence Board action directed merely to an alleged need for additional San Francisco-New York nonstop service. In a consistent pattern, they suggested not only the need for such service but urged support for the application of a single carrier, to-wit, American.

This Board in several instances has taken occasion to vigorously condemn such activities. In its opinion in Air Transport Associates, Enforcement Case, 14 CAB 805 (1951), the Board stated (p. 813):

> " *** The Board is aware, of course, of the campaign conducted by respondent and its president either directly or through the Aircoach Transport Association (of which respondent's president is also president) against the Board, both generally and with reference to this case. Indeed, the respondent's petition itself is replete with examples of such activity in the form of the various attachments thereto, and we have received more than 200 communications with reference to the petition for reconsideration . . . .
>
> " *** Such tactics are clearly in open violation of Part 300.2 of the Rules of Practice which part embodies the standards and principles by which the Board and persons appearing before it are governed in relation to formal proceedings before the Board . . . ."

An applicant in the Chicago-Milwaukee-Twin Cities Case, Docket No. 3207 et al., suggested in a letter to one of its large stockholders, that direct communication by that stockholder with various Congressmen and with the Hearing Examiner might result in a favorable disposition of its application. On learning of this, the Board, in a letter to the applicant, said, in part:

> "On the basis of the information presently available to the Board, we can only construe *** action in this respect as a patent attempt to bring pressure and influence to bear upon the Board with respect to its decision to be made in a pending proceeding.
>
> "However, in our judgment, activity of the sort with which we are here concerned is not a permissible one and goes beyond the bounds of propriety. It is in substance the solicitation of efforts by non-parties to sway the Board's judgment on the basis of non-record considerations. The Board considers the attempt to influence the Examiner by matters not of record in the proceeding to constitute particularly objectionable conduct."

Again, in the Subsidy Mail Exemption Proceeding, Docket No. 9376, as an outgrowth of the suggestion made by the president of Riddle Airlines to his stockholders that they write to their Congressmen and to members of the Board in support of the carrier's application for

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mail subsidies, the Board Chairman wrote the president of that company as follows:

> " * * * attempts to influence the Board's action through the pressure campaign lodged by you are deemed by the Board to be improper and contrary to the requirements of the Board's rules."

Chairman Durfee has already sharply criticized representatives of the City of San Francisco for their activities in the present proceeding, particularly for the following public statement made by the President of the San Francisco Public Utilities Commission:

> "The CAB members have 'isolated' themselves from influence by mail or wire . . . . Our only recourse is to subject them to the same perfectly legitimate pressures that they get from the lobbyists of other cities. We have reason to believe that this city has not gotten all it might from the CAB because the city has not used this kind of pressure before" (Conference--City and County of San Francisco, R. 3-4).

The admonition of the Chairman of the Board fell upon either deaf or unbelieving ears. Approximately one quarter of the aforementioned 122 letters and telegrams found in the Board's correspondence file were written after representatives of the City of San Francisco were warned of the consequences to be expected if their tactics were continued. At least five of them represent approaches made to the Board as a result of letters written to members of the Senate and House by Mayor Christopher.

This Board, in its consideration of the problem presented, has the benefit of a number of recent decisions of both the Supreme Court and the Court of Appeals for the District of Columbia, decisions involving the propriety and effect of ex parte attempts to influence agency action. Sangamon Valley Television Corp. v. U.S., 358 U.S. 49 (1958); Sangamon Valley Television Corp. v. US. (App D.C. 1959), Case No. 13992, ... F.2d . . . . (after remand); WIRL Television Corp. v. U.S., 358 U.S. 51 (1958); WORZ, Inc. v. F.C.C., 358 U.S. 55 (1958); WORZ, Inc. v. F.C.C., (App. D.C. 1959), Case No. 13996, ...F.2d .... (after remand); WKAT, Inc. v. F.C.C., (App. D.C. 1958), 258 F2d 418; Massachusetts Bay Telecasters, Inc. v. F.C.C., (App. D.C. 1958), 261 F.2d 55.

The following portion of the Court of Appeals' opinion in the Sangamon Valley Television case, supra, is particularly compelling and pertinent (op., pp. 6-7):

" *** The Commission and the intervenor contend that because the proceeding now on review was 'rule-making', *ex parte* attempts to influence the Commissioners did not invalidate it. The Department of Justice disagrees. On behalf of the United States, the Department urges that whatever the proceeding may be called it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open. We agree with the Department of Justice. *Accordingly the private approaches to the members of the Commission vitiated its action and the proceeding must be reopened.*

"We agree also that the Commission proceeding must be reopened for another reason. Agency action that substantially and prejudicially violates the agency's rules cannot stand. At the time of this proceeding the Commission had no general regulations governing all rule-making, but when it proposed an allocation of TV channels to particular communities it was its usual practice, followed in this instance, to prescribe a cut-off date before which 'Any interested person . . . may file with the commission . . . written data, views, or arguments setting forth his comments' favoring or opposing the plan; a cut-off date for 'comments or briefs in reply'; and that 'No additional comments may filed' without a request from the Commission or a showing of good cause. By plain implication, this rule forbade submitting material to the Commission's members after the time for filing it with the Commission had gone by. The rule cannot be interpreted to permit parties to make off the record contentions that it forbids them to make on the record." (Emphasis supplied.)

Of further interest to this Board should be these comments, contained in the brief filed with the Federal Communications Commission by its Associate General Counsel after remand of the Massachusetts Bay case (pp. 91-92).

> " *** We have indicated our belief that a member of Congress may properly communicate to the Commission his own views on a public interest problem involved in an adjudicatory proceeding or convey to the Commission the views of a constituent, so long as such communications are made a matter of record in the adjudicatory proceeding. However, we do not believe that the parties to an adjudicatory cause before the Commission may properly seek the intercession of legislative or executive officials, whether such intercession be on or off the record. For a party who takes such action is obviously seeking to enlist the prestige and influence of the Congressional or executive officer under the banner of his cause and thus to appeal to motivations which have no place in the proceedings contemplated by the Communications Act. Condonation of such action would imply that a comparative decision might properly turn upon the question of which applicant could enlist in his behalf the largest number of influential legislative and executive officials. Such a result would obviously be subversive of the Act's elemental purposes."

It is not enough for a Board or Commission to state, and state with complete sincerity, that ex parte attempts to influence its action have

been ignored. It is not enough that ex parte arguments and representations which an interested party has had no opportunity to answer may be honestly believed to have played no part in the Board's deliberations and conclusions. Pressure is an insidious force. Who can say when subjected to it that he has not been unconsciously influenced. This Board has been subjected to pressure in this proceeding and its Rules of Practice deliberately violated. It has been subjected to pressure only because it was assumed that such pressure would have some effect.

Those who are responsible for the application of such pressure have accomplished what they set out to accomplish. They have received favored treatment in the form of an expedited hearing of American's application, with the specific reason given for such expedition being the opportunity to conduct a full scale investigation of the impact of the operation of jet aircraft, an opportunity which has not been pursued and has not figured in the decision of the case. In contrast, no decision has yet been reached on the petition and complaint of the City of Dallas heard by the Board more than two years ago in the Dallas to the West Service Case, Docket No. 7596, et al. In the instant proceeding, duplicating service has been authorized at a net cost of millions of dollars to the industry (which service will provide no new type of equipment and no new times of aircraft departure or arrival) with no evidence whatever to indicate that adequate space will not be provided for all prospective passengers by the carriers already certificated to provide service. United has been denied the right to offer evidence which is clearly available and would clearly show that cost estimates submitted at the time of the hearing were grossly understated in view of subsequent developments. All of this has been done over the vigorous protest of the two dissenting members of the Board.

It will not suffice to merely deny that the improper pressures applied have in any way affected these results. The actions of this Board, if they are to command the respect to which they are entitled, must be free from the effects of improper influence in appearance as well as in fact. The taint which attaches to the present proceeding can be removed only by a fresh start, a hearing de novo of this case.

II.

THE RECORD IN THIS CASE IS FATALLY DEFECTIVE BECAUSE IT IS DEVOID OF RELIABLE EVIDENCE RESPECTING THE IMPACT OF JET AIRCRAFT ON THE ECONOMICS OF AIR TRANSPORTATION.

The Board made the issue of the impact of jets a primary reason for expediting this proceeding. It directed the Examiner to make specific findings on that question in determining whether the public convenience and necessity required a third nonstop carrier between San Francisco and New York (Order E-12103). It re-emphasized that position when it denied petitions for reconsideration of the order of expedition (Order E-12337). Member Hector, in a concurring opinion accompanying the latter order, characterized the instant case as a "test tube" for exploring the impact of jet equipment.

Once the decisional stage of the case was reached, that ground rule of the proceeding was all but abandoned. Except for a statement that jets possessed tremendous capacity and an estimate of a 10% traffic stimulation, the Examiner made no findings respecting the economics of jet operations. Beyond an unsupported conclusion that three carriers, by curtailing schedules, could operate at "above breakeven load factors," the Board did no more. On the contrary, the Board turned its back on the only economic data derived from actual jet operations by denying United's motion to reopen the record. This departure from the ground rules of the case in itself was highly prejudicial to United.

The Board concedes (Op., p. 20) that "it might be preferable if data based on actual operating experience of jet aircraft were in the record ***." Nevertheless, it chose to rely on estimates which were drawn purely from engineering information, the reliability of which has been destroyed by operating experience.

Costs--vital to the issue as to the impact of jets on air transport economics--are particularly critical here. The Bureau has admitted that a three-carrier operation would not be profitable until some time beyond 1960 (Bureau Br. to Ex., p. 30), the Examiner has shown anxiety as to the prospect of unprofitability (I.D., p. 45), and the Board's own conclusions establish that such operations, even on the basis of its unsupported assumptions, would be extremely marginal.

Experience has demonstrated that jet costs are substantially greater than were ever anticipated. The circumstance that complete evidence may not be available as to ultimate jet costs provides no basis for disregarding entirely the information that is available. Moreover, positive evidence exists of substantial increases in operating costs which will not decline with the passing of the introductory phase of jet operations. Among other things, the crew complement on American's and TWA's 707's has been increased by adding a third pilot and fourth stewardess--something not contemplated at the time of hearing. American's pilots have received a second round of pay increases, the effects of which were not reflected in American's expense estimates in this case (Ex. AA-82). American plans the conversion of its 707's to turbofan engines at a cost of approximately $40,000,000 beginning in 1960

(Docket No. 7984, R. 4252-4254). This, likewise, was not contemplated when the estimates in this case were prepared. TWA, in a letter filed with the Board in May 1959 in support of jet surcharges, listed increased fuel consumption, increased training times and longer routings due to airport flight patterns as factors increasing jet costs. The 707 is approximately 30 miles per hour slower than anticipated--a factor obviously affecting costs. Currently, TWA's eastbound San Francisco-New York nonstop flight time is 15 minutes longer than the schedules proposed by American in this case (Ex. AA-81; Official Airline Guide, Sept. 1959). On the basis of a statement by American's president that a 15 minute delay in take-off with a jet costs $400 (New York Times, June 21, 1959), this increase in flight time alone means more than $1,000,000 additional expense per year on even a 7.5 daily roundtrip schedule pattern.

Every carrier operating jets concedes that costs are substantially above the level anticipated. This is evident from the statements of carriers quoted in the dissenting opinion in this proceeding. American, 7 months after its estimates here had been prepared, said in a petition for reconsideration in the Jet Surcharge Proceeding, Docket No. 10142:

> "In our own company planning we have seen confident cost predictions proved false within brief periods as the planning period has proceeded, and the corrections have had to be upward. *** We know only that there is every reason to believe that costs will be considerably greater in the immediate future than seemed, six months or a year ago, to be probable."

Outside of this case, the Board itself recognizes the need for jet data developed from actual operating experience. It has been conducting a study as to the impact of jets which includes the question of costs. On January 16, 1959, Member Hector, in his dissent accompanying Order E-13395 (Docket No. 10142) stated:

> "No one yet knows exactly what the jets will cost to service, maintain, and operate. Only experience can tell us this. No one yet knows the extent to which passengers will prefer jet planes to piston type equipment, and the extent to which this may justify fare differentials. The carriers are boldly venturing into a new and revolutionary form of public transportation."

On February 10, 1959, the Associate Director of the Board's Bureau of Air Operations, appearing before the House Appropriations Subcommittee, testified (Hearings on "Independent Offices' Appropriations for 1960", pp. 163-164):

> " *** the actual operating costs of jet equipment cannot

be accurately stated as of this date. We are in the process of investi-

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gating whether we will allow a differential for jet operations, based on whether they cost more to operate. We don't know." Moreover, in Matter of Inquiry Concerning Pricing of Jet Services, the Board, by notice of March 20, 1959, requested jet operators to submit monthly reports on costs and traffic, stating that while "the volume of jet experience will be relatively small and not necessarily representative of longer term circumstances *** such actual cost and traffic data as are available will be useful." (Emphasis supplied.)

Notwithstanding the fact that the Board is actively seeking cost data based on actual operating experience in a matter relating to fares which it can reopen, investigate and change whenever circumstances warrant, it dispenses with the very same information when the issue is one of granting a permanent route certificate. It brushed aside the lack of experience data here on the ground that "precise accuracy" was unattainable. The question is not one of precise accuracy, but of substantial unreliability in the estimates submitted.

The Board's attempt to inject credibility into the estimates submitted by urging that they were derived from manufacturer's engineering information and that the 707 was one of the most tested aircraft (Op., p. 20), is unavailing. The commercial operation of the 707 is substantially different from its operation by the military. Moreover, as the dissent points out, manufacturers' break-even load factor estimates have never been considered reliable by either the carriers or the Board.

The Board's assertions that it customarily relies on estimates for the future and that there is no reason for treating estimates of future jet operations differently here (Op., p. 20), are answered by American itself. In its petition for reconsideration in Docket No.

10142, American states: "We are now in an economic situation which the industry has never before faced and may never face again. *** There is hardly an industry in the country that has ever encountered such a drastic shake-up as the air transport industry is now to undergo." As shown, Member Hector, in referring to the introduction of jets, similarly observed that "The carriers are boldly venturing into a new and revolutionary form of public transportation."

The Board is in no position to express doubt as to whether experience data "would provide any materially different or more reliable information" than the untested estimates of record (Op., p. 20). Without having received experience data, evaluation of it is impossible.

Experience has demonstrated the unreliability of the estimates as to jet economics submitted in this case. Lacking probative evidence on

this issue, the Board has no valid basis upon which to predicate findings as to either the impact of jets or the economic feasibility of jet operations by three nonstop carriers.

III.

THE BOARD'S DENIAL OF UNITED'S MOTION TO REOPEN THE RECORD FORECLOSED THE INTRODUCTION OF EVIDENCE NECESSARY TO A FAIR DECISION IN THIS CASE AND CONSTITUTES AN ABUSE OF DISCRETION.

United first filed a motion to reopen the record with the Examiner prior to his Initial Decision. After that motion was denied and the Examiner's Initial Decision was issued, United filed a second motion to reopen with the Board. The latter motion also was denied (Op., p. 21).

Both of United's motions were directed to the introduction of data respecting jet economics derived from actual operating experience. The nature of that evidence, to the extent available to United, is described under Point II. It was not in existence prior to the filing of United's motion. It goes to the foundation of the Board's findings on the issue whether nonstop jet service between San Francisco-New York by three carriers would be unprofitable for all concerned. That is an essential issue since Section 102 of the Act directs the Board to consider as in the public interest competition "to the extent necessary to assure the sound development of an air-transportation system." (Emphasis supplied.) See also, Reopened Southern Service to the West Case, 18 CAB 234 (1953); Clarke v. United States, (D.C., D.C., 1951) 101 F. Supp. 587.

This is not an ordinary case, as already shown. It is not the usual case of fluctuating economic conditions. On the contrary, it is a case where American, in the form of an expedited proceeding, sought to obtain a decision upon untested estimates before the facts of jet operations were known. Facts, however, are now available. Where, as here, the new evidence undermines findings on an essential issue, refusals to reopen the record constitute an abuse of discretion. Atchison, Topeka & Santa Fe Ry. Co. v. United States, 284 U.S. 248 (1932); Braniff Airways, Inc. v. C.A.B., (App. D.C. 1945), 147 F.2d 152; Enterprise Company v. F.C.C., (App. D.C. 1955), 231 F.2d 708, cert den. 351 U.S. 920 (1956); W. S. Butterfield Theatres, Inc. v. F.C.C., (App. D.C. 1956), 237 F.2d 552.

Denial of United's motions to reopen the record, therefore, also requires that the decision in this case be vacated and a rehearing granted.

IV.

THE BOARD'S OPINION ALSO IS FATALLY DEFICIENT FOR ITS LACK OF NECESSARY FINDINGS AND ITS ADOPTION OF CONCLUSIONS DIRECTLY CONTRADICTED BY UNDISPUTED EVIDENCE OF RECORD.

The Board's failure to make necessary findings of fact, its making of findings not supported by substantial evidence and its statement of conclusions that do not logically follow from findings that were made violate Section 1005(f) of the Federal Aviation Act and Section 8(b) of the Administrative Procedure Act. Deficiencies in the Board's opinion in these respects are as follows:

A. Adequacy of Existing Service. The Board's conclusions that the services of United and TWA "did not fully meet the needs of the traveling public" (Op., pp. 13-14), that "TWA was not a full-time vigorous competitor" (Op., p. 15) and that "the authorization of a third carrier holds the greatest prospect for the full development" of the San Francisco-New York market and would give traffic between those cities the "benefits of competition" (Op., p. 16) are not supported by adequate findings, and neither those conclusions nor the findings that were made are supported by substantial evidence:

1. The Board itself found (Op., p. 13) United's and TWA's past and existing San Francisco-New York services to be adequate.

2. It adopted the Examiner's finding that the San Francisco-New York market had been properly developed (I.D., p. 35).

3. Contrary to the Board's finding that nonstop schedules remained essentially unchanged in the face of a 44% traffic increase between September 1954 and March 1957 (Op., p. 14), undisputed evidence establishes a 66% increase in nonstop frequencies and only a 2% traffic increase between those periods (Official Airline Guide, Traffic Surveys, months cited).

4. The Board's finding (Op., p. 14) that "only a limited amount of first-class nonstop service was available" is invalid in view of the fact that United's and TWA's San Francisco-New York first-class nonstop flights operated at an average load factor of approximately 69% in January and March 1957 (Exs. BAO-117, 132) and the further fact that San Francisco's principal witness testifed that "almost all of the time you could get first-class reservations" (R. 336).

5. Likewise, any inference of insufficient service drawn by the Board from its finding that "only 20 nonstop coach seats per day were scheduled" in March 1956 (Op., p. 14), is equally erroneous since

transcontinental nonstop coach service was in its infancy at that time. The

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only other pair of points between which such service was then operated was Los Angeles-New York--a substantially larger market; the service was provided by TWA; and it consisted of only 20 more seats per day than were provided between San Francisco-New York (Official Airline Guide, March 15, 1956).

6. Contrary to the Board's finding (Op., p. 14) that the only San Francisco-New York nonstop coach service prior to May 1957 consisted of one eastbound flight by TWA, the undisputed facts are that TWA operated both eastbound and westbound nonstop coach flights as early as the summer of 1956, and United provided nonstop coach service in both directions beginning on April 1, 1957 (Official Airline Guide, September 1956, April 1957).

7. Notwithstanding the Board's statement (Op., pp. 15-16) that nonstop coach service was limited in comparison with first-class nonstop accommodations, the fact is that nonstop coach capacity was more than 80% of first-class nonstop capacity in both April and September 1957 (Official Airline Guide, months cited; Exs. BAO-117, 132).

8. The Board's findings (Op., p. 14) that United's and TWA's San Francisco-New York nonstop load factors remained high "even after the sharp increase" in service during the summer of 1957 and that high load factors reflected an inability of passengers to secure space, are contradicted by the facts. After reaching a peak of 75.9% in July 1957, United's and TWA's average nonstop load factor declined rapidly to 72% in September and 56% in November of that year (Ex. U-D, p. 7); beginning with July 1957 and at all times thereafter, San Francisco-New York nonstop load factors averaged below those prevailing between Los Angeles-New York (Ex. U-D, p. 7); and between May 1957 and July 1958 empty seats on San Francisco-New York nonstop flights averaged

between 127 and 328 per day (Ex. U-D, p. 8). Moreover, there is no evidence that a single San Francisco-New York passenger was deprived of air transportation between those cities.

9. The Board, in relying on an alleged failure of United and TWA to increase their San Francisco-New York nonstop schedules prior to 1957 and in characterizing such an alleged failure as a "long-standing scheduling practice of the existing carriers" (Op., pp. 15-16), failed to explain why United and TWA should now be criticized or penalized for not having anticipated, 2 1/2 years in advance, the precise month in which an increase in the demand for nonstop service might occur. This omission is particularly prejudicial in view of the following facts: The aircraft which United and TWA received in 1957 and immediately used to enlarge their San Francisco-New York nonstop service, were ordered in late 1954 and early 1955 (Exs. U-D, p. 12; TWA-79, p. 6). However, the Board, as late as its decision of November 1955 in the Denver Service Case, did not appear to perceive a prospective increase in the demand for nonstop service between these points. On the contrary, the Board in its opinion in the present proceeding maintains that a change in the character of the transportation demands of this market occurred during some undefined period subsequent to 1955 (Op., pp. 4-5). Furthermore, the opinion is devoid of any finding that, during the period while United and TWA were awaiting delivery of their new equipment, the one-stop flights with which they supplemented nonstop frequencies did not provide useable and convenient service in response to the requirements of the traveling public.

10. The Board's inference (Op., p. 15) that the increase in San Francisco-New York nonstop service was partially attributable to the filing of the American's motion for expedition on May 3, 1957, is also contrary to undisputed evidence: United and TWA planned their 1957 increases in San Francisco-New York nonstop service in late 1956

(Exs. U-D, TWA-78, 79) and United in March 1957 filed with the Board schedules showing its planned expansion in service during the summer of 1957, including the additional San Francisco-New York nonstop frequencies that it added on April 1 and June 27, 1957 (Ex. U-D, p. 17).

11. The Board's conclusion that TWA was not a full-time vigorous competitor between San Francisco and New York (Op., p. 15) is refuted not only by TWA's undisputed participation in the traffic, which approximated or at times exceeded that of United, but also by the frequency and variety of services that it operated, including Siesta Sleeper Seat service, the competitive implications of which the Board has had under investigation for some time (Official Airline Guide, 1956-1959).

12. Contrary to the Board's broad generalization that American's certification would give this market the benefits of competition (Op., p. 16), the undisputed facts are that American does not offer the traffic anything different in equipment, type or quality of service, fares, departure and arrival times or frequency than is being provided or planned by United and TWA (Exs. U-D, pp. 18-19; TWA-79, pp. 2-3). On the contrary, the assumption underlying the Board's opinion is that United and TWA would have to down-grade their service to make room for American and that during at least half of the year, the public would have a lesser choice of departure times than it would were American's application denied.

B. Traffic Forecast. The Board's conclusion that San Francisco-New York nonstop traffic will total 366,000 passengers in 1960 (Op., pp. 6-10) is not supported by adequate findings and does not logically flow

from the findings that were made, and even those findings are not supported by substantial evidence:

1. The Board's estimate exceeds the Examiner's estimate of "nearly 350,000 passengers" (I.D., p. 42) without

explanation for the increase.

2. The Board's estimated 1957 nonstop potential, based on unadjusted 1957 O&D survey data (Op., p. 7), is necessarily over-stated because those data are based on inflated ticket-sale reports and include Los Angeles-New York passengers as San Francisco-New York traffic (Ex. BAO-a), international passengers now using international carriers (Exs. U-D, p. 29; TWA-103), excursion coach traffic (Exs. TWA-51, 59), and stop-over traffic--none of which represents, or has been shown to represent, nonstop potential.

3. The Board's attempt to justify its inclusion of excursion coach traffic in the foregoing base data (Op., p. 8) assumes that excursion coach fares would be applicable to jet nonstops and that United and TWA plan drastic reductions in intermediate stop service (inferring that excursion coach traffic, therefore, would be forced on jet nonstops). The first assumption is contradicted by published tariffs and the second is unsupported by probative evidence.

4. The Board's attempted justification of its estimated 1957 nonstop potential by comparing the same with United's estimated total 1957 through passengers between San Francisco-New York (Op., p. 8) is erroneous because United's estimate is for total through traffic (Ex. U-110). Since not all of that traffic would be available for nonstop service, United, after extending the 1957 figure to a 1960 level, reduced the projected amount in order to exclude passengers who would continue to use intermediate stop flights. No such adjustment was made in the Board's estimate.

5. Historical evidence demonstrates that the Board's assumed 10% per year normal traffic growth between 1957 and 1960 (Op., p. 9) is overstated. San Francisco-New York traffic declined 5.69% during one of the years (1958) covered by the Board's projection (1957-1958 Traffic Surveys). In 4 of the 6 years during the period 1952-1958, the annual growth of that market was materially less than 10%. (Ex. U-141; 1958 Traffic Surveys). The only instances during this period

when annual growth exceeded 10% were years when traffic was affected by technological stimulation, i.e., the inauguration of nonstop services (Official Airline Guide, 1954-1955). Even including those years, the annual rate of growth over the entire 6 year period referred to averaged approximately 9% (Ex. U-141; 1958 Traffic Surveys).

6. The basis for the Board's assumed 10% jet stimulation (Op., p. 10) is not set forth and, as previously shown, that estimate is not supported by experience data of record.

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C. Economics of Three-Carrier Jet Operations. The Board's conclusions that three nonstop carriers can "operate at above break-even load factors" in 1960, that "after that, normal traffic growth should soon permit operations by the three carriers on a more profitable basis," and that "ultimately, we fully expect the sizeable growth potential of this rich and important longhaul market will warrant the scheduling of additional frequencies by the three carriers" (Op., pp. 12-13), are not supported by adequate findings, and neither those conclusions nor the findings that were made are supported by substantial evidence:

1. The record, as shown, is devoid of reliable cost data necessary for any such conclusions.

2. The Board made no finding as to what the break-even load factor would be for 1960 or subsequent years; it made no finding with respect to expenses or revenues for 1960 or later years; and the only traffic forecast that it made was for 1960 and, as previously shown, that forecast is overstated.

3. The Board's footnote statement (Op., p. 12) that "the break-even load factor for the 707 jet was estimated to be about 54.3%" appears to be a reference to American's estimate (AAL Br. to Ex., p. 32). Any conclusions of the Board based on that estimate are erroneous because American's projected break-even load factor is for 1959, while the Board's traffic forecast is for 1960. Since American admits

that its operating costs over this route would increase annually (Ex. AA-82), its break-even load factor would necessarily be higher for 1960.

4. The assumption underlying the Board's conclusions is that if American were certificated, United and TWA, as well as American, would have to reduce their planned frequencies of 3 daily roundtrips per carrier to 2 such trips each during at least 6 months of the year (Op., pp. 11-12). This assumption is in direct opposition to the undisputed testimony of United, TWA, and American in this case that 3 daily rounds trips per carrier throughout the year are required to provide a full complement of service and develop the traffic (Exs. U-1, D; TWA-31, 79; AA-81; R. 547-48, 601-2, 692-94) as well as to more recent testimony of American that it would operate 3 San Francisco-New York nonstop roundtrips daily in the event of a grant of its application in this case (Docket No. 7984, R. 4029).

5. Further, the assumption is predicated on an argument advanced for the first time by American's counsel on brief and not subject to cross-examination or rebuttal.

D. Diversion. The Board's conclusions that it does "not envisage any serious financial harm accruing from the authorization of a third unrestricted carrier" (Op., p. 17), that it is "unable to find that the probable diversion *** will impair the financial health" of United or TWA (Op., p. 18), and that "the present and long-range benefits of the additional service being authorized outweigh the effect which such service may have" on United and TWA (Op., p. 18) are not supported by adequate findings or substantial evidence:

1. Diversion of approximately $12,000,000 from United and TWA, which the Board admits would occur (Op., Appendix B), is substantial per se.

2. Contrary to the Board's conclusions, the estimated diversion

from United and TWA would be the equivalent of approximately 45% and 273% of their respective 1958 domestic net revenues (Forms 41; Ex. U-110, p. 9).

3. The basic assumption underlying the Board's entire opinion is that an impairment of United's and TWA's San Francisco-New York nonstop service would be necessary were American certificated (Op., p. 12).

4. There is no adequate explanation for the Board's adoption of a "growth offset theory" of diversion in view of the Examiner's rejection of that theory (I.D., p. 39).

5. In any event, application of the "growth offset theory" of diversion fails to establish that the 1960 financial results of United's and TWA's operations over this route, after diversion by American, would be better than they were in 1957 without American's participation.

6. There are neither findings nor evidence that any present or long-range benefits would accrue from American's certification.

E. Reversal of Denver Service Case. The Board's reversal of its decision in the Denver Service Case that public convenience and necessity do not require a third San Francisco-New York nonstop carrier is not supported by adequate explanations, findings or evidence of record:

1. The Board's opinion in the Denver Service Case speaks for itself and refutes the Board's present statements (Op., p. 6) that American was there cast in the role of a third transcontinental competitor in the San Francisco-New York market.*

---

* The Board's adoption of American's claimed participation in the San Francisco-New York market (Op., pp. 6, 22) is also erroneous. Because of the abuses associated with common fares and because of American's dominant position in the Los Angeles-New York market, American's alleged participation consisted largely of Los Angeles-New York traffic reported in the Board's surveys as San Francisco-New York business (Exs. BAO-a; U-D, U-147; TWA 46, 47).

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2. The changed conditions cited by the majority--i.e., the size, rate of growth, future potential and "marked change in the character of the transportation demands" of the San Francisco-New York market (Op., pp. 4-5)--are inadequate justifications for reversal of the Denver Service Case. Between 1955-1958, San Francisco-New York traffic increased 27 passengers in each direction per day (1955-1958 Traffic Surveys). The growth in the traffic totalled 8.9% over the entire period. The future potential is undefined. Whatever change there may have been in the character of the transportation demands in this market is directly attributable to United's and TWA's vigorous promotion of their nonstop services.

3. Even the introduction of jet aircraft is not a new circumstance justifying the Board's change in position. The prospect of jet service was raised by both American and San Francisco in the Denver Service Case. In any event, the absence of reliable evidence regarding the economics of jet operations precludes a finding here that the inauguration of service with that equipment warrants reversal of the Board's prior decision.

F. Lack of Other Findings. The Board's opinion is further deficient for its failure to set forth reasons for its rejection of United's traffic forecast (Ex. U-110), particularly the portions thereof based on actual traffic movements. It is also deficient for its failure to explain the Board's rejection of United's position with respect to the effects of revenue diversion on passenger fares. Similarly, it is deficient for its failure to set forth findings with respect to the following exceptions of United to the Examiner's Initial Decision: Exception 2, second and fourth paragraphs; Exception 4, first and second paragraphs; Exception 5 as it relates to the Examiner's reliance on the Great Lakes-Southeast Service Case; Exception 6, second and third paragraphs; Exception 7; Exception 9, third paragraph; Exceptions 12 through 15; Exception 17; and Exceptions 20 and 21.

The cumulative effect of the foregoing deficiencies in the Board's opinion is of such magnitude that a rehearing of this proceeding is required.

V.

THE LACK OF DUE PROCESS PERMEATES THE ENTIRE PROCEEDING.

Time and again throughout the course of this proceeding, United has been denied an opportunity to make a fair presentation of its position or to fairly answer the arguments made in support of American's application. Separate consideration has been given to the efforts of interested parties to improperly influence the decision of the

Board, but other aspects of the issue of due process likewise compel a reopening of the proceeding. Particularly when their cumulative effect is considered do they demonstrate the impossible handicaps under which United and, also, of course, TWA, have been forced to try this case.

A. The Refusals of the Board and the Examiner to Direct Production of the Bureau's December 1957 Report or to at Least Provide for In Camera Inspection of the Same.

The Board, by Order E-11493 of June 26, 1957 directed the Bureau "to review the problem of the air service pattern between New York and San Francisco and report the results of that study to the Board on or about December 1, 1957, so that it [might] re-examine the public need for an early hearing on the issue of nonstop service." The Bureau submitted such a report (R. 1278). In view of the close similarity between the question submitted to it for study and the ultimate issue in this case, the Bureau's report necessarily contains data bearing upon, and an expression of position with respect to, the question of whether or not a public need exists for a third nonstop carrier between San Francisco and New York.

Notwithstanding the fact that the Bureau in this report must of necessity have stated its position to the Board on this fundamental issue, it took no position thereon when it made its appearance in the present proceeding. Having avoided the exposure of its witness to cross-examination, the Bureau in its brief to the Examiner asserted, and asserted for the first time publicly, its support of American's application.

United and TWA repeatedly requested production of the Bureau's report, but each of their requests was denied. (Order E-12337; Prehear. Conf. Rep., pp. 3-4; Examiner's Ruling of May 20, 1958; R. 1280-81). In fact, once existence of the report was established, the Examiner foreclosed all cross-examination with respect thereto (R. 1278A-79). The Bureau's conduct, supported as it was by both the Board and the Examiner, deprived United of an opportunity to fully present its case, for it made impossible the questioning of the Bureau's witness with respect to such inconsistencies as may have existed between his testimony and the Bureau's failure to take a position at the hearing, on the one hand, and the prior Bureau report, on the other.

While Board regulations (PN-3, Sec. 1.4) declare internal memoranda of the Board to be "confidential", there is a vast difference between "confidential" and "privileged" communications. The fact that a document may be confidential does not create a privilege. Communist Party of the U.S. v. Subversive Activities Control Board, (App. D.C. 1958),

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254 F.2d 314. However, even were the Bureau's report "privileged", the privilege of non-disclosure yields when "the fundamentals of fairness" require production. Roviaro v. U.S., 353 U.S. 53, 60 (1957); Communist Party of the U.S. v. Subversive Activities Control Board, supra. Moreover, since Bureau Counsel requested United, TWA and San Francisco to produce as exhibits in this case (and they did produce as Exhibits U-A, TWA-33, and CCSF 101-108), data that they had

previously submitted to the Bureau at its request in conjunction with the study and report in question, any previously existing privilege was thereby waived. In Re Boeing Airplane Co., (D.C., D.C. 1959), 9 Pike & Fischer, Administrative Law (2d) 195. Refusal to give United and TWA access to the Bureau's report on the ground that it was "confidential", therefore, was erroneous.

The Examiner's ruling that the report was "immaterial" is equally invalid. "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness." Jencks v. U.S., 353 U.S. 657, 669 (1957). The report in the instant case meets that test, for it necessarily contained data and expressions of opinion relating to the issues in this proceeding. Since the Bureau was a formal party to the case, United was entitled to know and interrogate its official witness with respect to any inconsistencies between the Bureau's past and present position on the same issues. The error was compounded by the Examiner's refusal to even permit cross-examination as to the authors of the report or whether the Bureau's witness participated in its preparation (R. 1278A-79).

At the very least, United was entitled to have the Bureau's report submitted to the Examiner for inspection in camera so that he might determine whether significant inconsistencies did exist between the report and the Bureau's position in the hearing. Roebling v. Anderson, (App. D.C. 1958), 257 F.2d 615; U.S. v. Certain Parcels of Land, (D.C. S.D., Calif. 1954), 15 F.R.D. 224. Not even this was done.

B. The Gross Inequality of Time for Oral Argument Provided for Proponents and Opponents of a Third Nonstop Carrier.

Section 1001 of the Act provides that "The Board *** may conduct [its] proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice." (Emphasis supplied.) The plain intent of this language is to preserve the fundamentals of fair play throughout Board proceedings. The Supreme Court has held that "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Morgan v. U.S.*, 304 U.S. 1, 20 (1938).

Substantial, if not exact, equality in time for oral argument is the least that is required. Court rules customarily prescribe equal time for opposing parties. (See Supreme Court Rule 44; Rule 19 of the Court of Appeals for the District of Columbia).

Instead of equal or substantially equal treatment, the Board made the following allotments of time: to American and Northwest, 40 minutes each; to the City and Chamber of Commerce of San Francisco, 10 minutes jointly; to the City and Chamber of Commerce of Oakland, 10 minutes jointly; to the Port of New York Authority, 10 minutes; to Bureau counsel, 30 minutes; and to United and TWA, 30 minutes each. Since all of these parties, except United and TWA, urged the Board's adoption of the Examiner's Initial Decision, at least in so far as it recommended the certification of a third nonstop carrier, the foregoing allotments gave United and TWA a total of 1 hour for oral argument as compared to 2 hours and 20 minutes for their adversaries.

After receipt of notice of these allotments, United, by letter of April 15, 1959, called the disparity in time to the attention of the Board's Chief Examiner, pointed out that it would be physically impossible for United to make a proper presentation to the Board within the time accorded it, and asked for additional time for oral argument. The Chief Examiner's reply, under date of April 17, 1959, was: "I regret that it will not be possible to grant the increase in time which you have requested."

The initial injustice was compounded at the time of oral argument. Not until the argument began did United know that 13 members of Congress would participate with an additional time allotment of more than 2 hours. All of them advocated adoption of the Examiner's Initial Decision recommending approval of American's application. For reply to four hours and twenty minutes of argument in support of a third nonstop carrier, a certification which if made would cost them millions of dollars annually, United and TWA were given the handsome total time allotment of 1 hour.

The issue is not new to the Board. In discussing situations where additional time is allowed to Congressional representatives to present oral argument in favor of a particular community or an applicant without a corresponding increase in the time allotted to other parties, Member Hector, in his concurring and dissenting opinion accompanying Order E-13835 in the Great Lakes-Southeast Service Case, Docket No. 2396, et al., observed:

> " *** I think it must be agreed that it is basically an unfair mode of procedure and that it could in certain circumstances give a party an unfair advantage. The same is true in a case where several Congressmen argue for one of the carrier-applicants on time additional to that allotted the carrier while the other competing carrier-applicants are confined to their originally allotted time."

In 30 minutes United could not hope to adequately and intelligently discuss and explain its position upon such vital issues, among others, as the adequacy of its past service, the ability of United and TWA to satisfy all future traffic demands, the size of the future market, the effect of jet operations upon the size of that market and upon airline costs and profits, and the dissimilarity of the New York-San Francisco market to other markets with which it was compared. This is amply demonstrated by the many erroneous conclusions of fact appearing in the Board's decision, to which more specific reference has previously been made. Much less could counsel for United have time to reply to arguments advanced for the first time on oral argument or in written statements filed thereafter by members of Congress, with respect to such matters as the effect that the certification of the third nonstop carrier would have upon the national defense and the postal service.

Since this proceeding must be reopened in any event, the prejudice to United as a result of the above described disparity in time can and should be corrected on the oral argument that must necessarily follow the reopened hearing.

C. The Casting of the Decisive Vote By a Board Member Not Present at Oral Argument.

Participation in the decision of the Board by Member Hector, who was not present at the time of oral argument, is a further instance of the unfairness of the procedures followed in this proceeding.

In view of his expressed interest in the effects of the operation of jet aircraft and his expressed views with respect to the participation of members of Congress in oral argument, it is reasonable to assume that his presence at the time of oral argument would have led to a more thorough consideration of those issues, all of which were important in this proceeding. It is not enough that he may have cast his deciding vote only after reading a transcript of the oral arguments made on behalf of United and TWA. The question is how the oral argument might have been affected by his presence and how his conclusions might have been affected by exposure to oral argument.

Oral argument having been requested by United and the presence of Member Hector not waived, WIBC, Inc. v. Federal Communications

Commission, (App. D.C. 1958), 259 F.2d 941, cert. den. 358 U.S. 920 (1958), is authority for the conclusion that his vote should not have been cast, and that independently of other considerations, the decision of the Board should be vacated. All the more inescapable is this conclusion where the action complained of constituted but one link in a chain of improper procedures.

D. The Unexplained Inconsistency of the Decision With Prior Opinions of Two of the Members Supporting it.

United does not question the right of a member of the Board to change his views or the propriety of such action. Changed conditions may place an old problem in a new light, or reconsideration of a problem may lead to the conclusion that views earlier held were erroneous.

A carrier affected by such a reversal of position has a right to know the considerations on which it was based and to address an argument to those considerations. United has been deprived of that right.

Vice Chairman Gurney in a separate opinion accompanying the Board's decision of September 30, 1958 (E-13024) in the Great Lakes-Southeast Service Case, Docket No. 2396, et al., dissented from the then majority's action in certificating Northwest as a third carrier between Chicago and Miami in competition with Eastern and Delta on the following grounds:

> " *** Because of the impact of the forthcoming new era in air transportation, the Board should not now authorize additional competition over competitive routes where the competing carriers have definite plans to operate jet equipment. The existing carriers should be given the opportunity to inaugurate their jet fleets without excessive competition. This decision does not provide the existing carriers on this route with the most healthful climate to embark on the jet age. To this end, the Board has not met its responsibility to 'foster sound economic conditions' in the industry."

On May 7, 1959, Vice Chairman Gurney again dissented from the majority's second supplemental opinion in that case, reaffirming his prior dissent.

Notwithstanding the substantially smaller volume of traffic between San Francisco and New York, the complete absence of new one carrier service by the applicants here, the inability of the route to economically support three nonstop carriers operating jet equipment and the actual operation of nonstop jet service by the presently certificated carriers, Vice Chairman Gurney, 8 days after reaffirming his dis-

sent in the Great Lakes-Southeast Service Case, took a diametrically opposed position in the present case. On May 15, 1959, he voted to certificate American as a third nonstop carrier between San Francisco-New York, where the authorization of additional competition would produce all of the adverse consequences described in his prior dissent.

Member G. Joseph Minetti in the Eastern Route Consolidation Case, Docket No. 3292, et al., likewise dissented from the opinion of the majority (E-11184 of April 1, 1957) certificating American (the same carrier that would be certificated here) as a third nonstop operator between St. Louis and New York. One of his principal reasons for doing so was that "the Board's frequently stated objective of achieving and maintaining competitive balance between trunkline carriers is of paramount importance to the public as well as to the carriers themselves" and that the award there would defeat that objective and "further increase American's dominant position in the industry."

Despite the findings of the Bureau, the Examiner and the majority of the Board itself (by adoption of the Initial Decision) that the award to American here would increase its revenues by approximately 12 million dollars annually and result in a comparable reduction in the revenues of United and TWA (I.D., Appendix V), Member Minetti departed from his prior view and voted for an award which would do exactly what he previously said should not be done.

The opinion of the Board in the instant proceeding is devoid of any explanation for the reversal of these prior opinions held and expressed by Members Gurney and Minetti. United is thereby deprived of the opportunity, to which it is entitled, to direct an argument to the considerations which produced a change of position on the part of these members of the Board.

E. The Announcement of the Board's Decision by Press Release.

The validity of a decision first announced in the form of a press release is presently under attack in the United States Court of Appeals for the Second Circuit. Eastern Air Lines v. Civil Aeronautics Board, Case No. 25,422, et al. If such a decision should be held invalid by that Court, United would urge application of the Court's ruling to the present proceeding.

The attempts to improperly influence the decision of the Board and the refusal of the Board to reopen the record for the admission of significant and available evidence, covered in other portions of the brief, should also be considered on the issue of due process.

VI.

CONCLUSION

Wherefore, United Air Lines, Inc., respectfully requests that the Board reconsider its decision in this case, that upon such reconsideration it reopen the proceeding for hearing and argument as herein requested, and that the Board grant to United such other and different relief as it may deem proper.

Respectfully submitted,

H. Templeton Brown,
John T. Lorch,
/s/ Floyd M. Rett,
231 South LaSalle Street,
Chicago 4, Illinois

Attorneys for United Air Lines, Inc.

Mayer, Friedlich, Spiess,
Tierney, Brown & Platt *** and

James Francis Reilly ***

Of Counsel

Dated: September 22, 1959

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Certificate of Service

I hereby certify that I have this day served the foregoing Petition on all parties to the above entitled proceeding by mailing copies thereof to them, or to their attorneys, properly addressed and with postage prepaid.

Dated at Chicago, Illinois, this 22nd day of September, 1959.

/s/ Floyd M. Rett
Attorney for United Air Lines, Inc.

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APPENDIX A

AFFIDAVIT OF MR. MERRITT GREENE

State of California)
City of Watsonville) ss.
County of Santa Cruz)

Merritt Greene, being first duly sworn, deposes and says:

1. I am and at all times referred to in this affidavit as an officer and employee of Travel Advisors, a travel agency located at 24 East San Fernando, San Jose, California.

2. On or about May 22, 1957, I sent a communication to the Civil Aeronautics Board, Washington, D. C., in connection with the New York-San Francisco Non Stop Service Case, C.A.B. Docket No. 9214. This action I took at the request of Mr. Wm. Ellsworth, Sales Representative for American Airlines, who asked that I write to request support of their case to supply additional non-stop service between New York and San Francisco.

/s/ Merritt Greene

[Jurat dated September 16, 1959]

[5146]

* * *

State of New Jersey)
) ss.:
County of Essex)

ALFRED F. MANNO being duly sworn, deposes and says:

I reside at 568 South Clinton St., East Orange, N.J. and I am engaged in the business of a travel agent at 885 South Orange Avenue, East Orange, New Jersey, said business being conducted under the name Manno Travel Agency.

In March 1959, I wrote a letter to Representative Hugh J. Addonizio. I sent that letter at the request of Mr. James Bowlin, of American Air Lines. Shortly before the time I sent the letter he spoke to me about the problem American Air Lines was having in trying to obtain permission from the CAB for a non-stop route between New York and San Francisco. He asked me if I would be willing to send a letter along the lines of the letter that I sent. I agreed to do so and sent the letter.

/s/ Alfred F. Manno

[Jurat dated __ September, 1959]

[5147]

PENTHOUSE
TRAVEL CENTER, INC.

Cruises - Tours - Resorts
501 Fifth Avenue (at 42nd St.), NYC

* * *

July 9, 1959

Mr. Leon C. Morrier
Manager - Agency & Interline Sales
United Air Lines, 80 East 42nd St.
New York, N. Y.

Dear Mr. Morrier:

Your visit to my office yesterday was a most pleasant surprise. I am always delighted to see you.

I can appreciate your interest in the subject discussed, i.e., our letter to our Congressman requesting his support of the application of American Airlines to provide for non-stop service to San Francisco. Permit me to assure you that a similar action on our part would be offered to any scheduled carrier whose current service we considered excellent and who requested our assistance in opening new routes for their line.

As an accredited travel agent, recognizing our obligation to our valued clientele, it is our constant desire and purpose to assist and cooperate with any carrier who is striving to improve air service to any specific point, particularly popular holiday areas, by augmenting their flight frequency, thus providing a better service to the traveling public who contribute to our mutual support.

In no way was there any intent on our part to jeopardize or to injure the position of the two principal carriers to San Francisco. It is our opinion that competition stimulates a continuous effort on the part of the competing airlines to provide the best possible air service. This can prove only beneficial to the ever increasing number of air-minded passengers.

As you are aware, we are planning to initiate a Western and Hawaiian Program for 1960. With that program in mind, we definitely feel that a third carrier, providing non-stop service to San Francisco, would be an asset in providing the best possible flight frequency, availability of accommodations to our clients, and would reduce the pressure resulting from uncertainty of space confirmation during peak periods.

You have our assurance of our continued support of any program your organization may initiate to stimulate air traffic.

With kindest personal regards, I remain, Cordially yours,

PENTHOUSE TRAVEL CENTER, INC.
/s/ Terri Pollack (Miss), Vice President

* * *

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AFFIDAVIT OF JOHN A. ROSE

State of California)
) ss.
County of Alameda)

John A. Rose, being first duly sworn deposes and says:

I -- I am and at all times referred to in this affidavit was the District Sales Manager for United Air Lines with offices at 1930 Broadway, Oakland, California.

II -- On or about August 12, 1959 I discussed with Mr. A. G. Andrews, Andrews Travel Agency, 2043 University Avenue, Berkeley 4, California, the matter of the New York-San Francisco non-stop service case, CAB docket #9214. On inquiry Mr. Andrews stated that in 1957 he communicated with persons in official governmental capacities in Washington regarding this case. Mr. Andrews further stated to me that he was returning a favor done for him by American Air Lines -- namely, the sponsorship of his Berkeley travel agency. Mr. Andrews stated that this action was taken at the request of an American Air Lines representative.

/s/ John A. Rose

[Jurat dated September 17, 1959]

[5149]

AFFIDAVIT OF JOHN A. ROSE

State of California)
) ss.
County of Alameda)

John A. Rose, being first duly sworn deposes and says:

I -- I am and at all times referred to in this affidavit was the District Sales Manager for United Air Lines with offices at 1930 Broadway, Oakland, California.

II -- On or about August 12, 1959 I discussed with Mr. Patrick Mitchell of the Contra Costa Travel Bureau, 1804 Colfax, Concord, California, the matter of the New York-San Francisco non-stop service case, CAB docket #9214. On inquiry Mr. Mitchell stated that in 1957 he wired Congressman John F. Baldwin, Jr., requesting the Congressman's support for an expedited hearing on American's application. He stated that this action was taken at the request of an American Air Lines representative.

He further stated to me that at the time American approached Contra Costa Travel Bureau it was a partnership with Mr. W. H. McGinnis. The matter of support for American was discussed between the two partners, and it was Mr. McGinnis' recommendation that they so sponsor, he being the senior partner. Mr. Mitchell now tells me that this partnership has been dissolved, he remaining as sole owner.

/s/ John A. Rose

[Jurat - September 18, 1959]

[5150]

State of New York)
) ss.:
County of New York)

Leon C. Morrier being duly sworn, deposes and says:

I reside at 325 East 41 Street, New York 17, New York, and I am an employee of United Air Lines, Inc. My position with said company is Staff Superintendent Interline and Agency Sales, Eastern Region.

On September 17, 1959, I had a conversation in person with Mr. Elsworth Conn of the Conn Travel Service, Moristown, New Jersey. Said Mr. Conn stated to me at that time that prior to May 7, 1959, he had sent a telegram to United States Senator Clifford F. Case, which telegram stated in substance that he supported the application of American Air Lines, Inc. in the above entitled proceeding. Said Mr. Conn stated that said telegram was sent to Senator Case at the request of a James Bowlin. To the best of affiant's knowledge and belief, said James Bowlin is an employee of American Air Lines.

/s/ Leon C. Morrier

[Jurat - September 18, 1959]

* * *

[5151]

AFFIDAVIT OF J. P. DUNHAM

State of California)
) ss.
County of San Joaquin)

J. P. Dunham, being first duly sworn, deposes and says:

1. I am and at all times referred to in this affidavit was Station Ground Services Manager for United Air Lines with office at 1355 Lindbergh Street, Stockton, California.

2. On or about August 12, 1959 I discussed with Mr. R. John Charles, Jr., co-partner and manager if the Charles Travel Service, 125 North Hunter Street, Stockton, California, the matter of the New York-San Francisco non-stop service case, CAB Dockett No. 9214. On inquiry Mr. Charles stated that in 1957, he communicated with persons in official governmental capacity in Washington, D. C. regarding this case. Mr. Charles further stated to me:

> This action was taken at the request of an American Airlines representative.

/s/ J. P. Dunham, Station
Ground Services Manager

[Jurat - September 17, 1959]

[5177]

ANSWER OF AMERICAN AIRLINES, INC. TO PETITIONS FOR RECONSIDERATION OF ORDER NO. E-14412

HOWARD C. WESTWOOD
JOHN W. DOUGLAS
EDWIN H. SEEGER

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Washington 5, D. C.

Attorneys for
American Airlines, Inc.

October 2, 1959

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ANSWER OF AMERICAN AIRLINES, INC. TO PETITIONS FOR RECONSIDERATION OF ORDER NO. E-14412

Trans World, United and Northwest have petitioned the Board to reconsider and revise its Order No. E-14412 of September 2, 1959 in the above case. That decision held that the public convenience and necessity required removal of the restriction on American's San Francisco-New York services. The petitions for reconsideration should be denied; they cast no doubt on the validity of the Board's conclusions or on the accuracy and sufficiency of its findings. American also asks the Board to deny the requests for reopening of the record and for a stay of its order.

I. THE BOARD HAS MADE ADEQUATE FINDINGS AND CONCLUSIONS WHICH ARE AMPLY SUPPORTED BY THE EVIDENCE.

A. THE ECONOMICS OF JET OPERATIONS

Trans World and United assert that the Board has not made sufficient findings on the economics of jet operations, that such findings cannot be made without more operating experience, and that accordingly the record is fatally defective.

Trans World and United's claim is essentially that no findings on jet costs could be made until after a substantial period of jet operations; in other words no weight can

be given to estimates, no matter how sound. But the Board's order starting this case did not specify that evidentiary hearings should await even the start of jet operations. Trans World and United had pressed this argument in opposing the setting of the application for hearing but it was rejected by the Board. What Trans World and United were really saying then, and are saying now, is that the Board cannot cope with problems in their incipiency but only after-the-fact. Such a negative approach would destroy the very dynamism which is essential to the administrative process.

Of course, it should be noted that in ordering this expedited hearing the Board was not solely motivated by a desire to inquire into the economics of jet operations. In denying petitions for reconsideration of its order instituting the case the Board referred to apparent service inadequacies, which alone were sufficient to justify the proceeding. (Order No. E-12337, April 9, 1958, pp. 2-3; see also concurring opinion, p. 3). By the same token, the Board's findings on market size, service inadequacies, American's past participation and nonstop authorizations in comparable markets would have provided a sufficient basis for authorizing removal of American's restriction.

Nonetheless, the Board's interest in obtaining data on jets has been fully vindicated by the evidence in this case. The Board has been able to make precise findings on such key matters as jet costs, future traffic levels and jet scheduling. Moreover, the results of the first months of jet operations confirm the reliability of these findings.

1. Costs

The Board found that the break-even load factor for New York-San Francisco nonstop jet service would be 54.3%

(Order No. E-14412, p. 12, n. 17). This finding is supported by detailed studies and estimates submitted by American. (Ex. AA-82; Tr. 789-796, 828-831). These estimates went unchallenged by either Trans World or United at the hearing; it was only after the close of the hearing that United sought to controvert them. Even then, United limited itself to the assertion that, because of the increase in crew complement brought on by the new pilot contract, and because American was using an additional stewardess on its jets, American's jet costs were higher than projected. (Motion to Reopen, February 17, 1959, pp. 2-4). But, as American pointed out in its answer to the motion to reopen, American's original cost estimates had included substantial contingency allowances which more than compensated for the alleged cost increases. (Answer, February 26, 1959, pp. 5-6).

Under these circumstances there is no basis for the suggestion that the Board was required to reopen the record to hear "new evidence" on costs and that the failure to reopen the record constituted an abuse of discretion. The cases cited by United on this point refer only to instances where new evidence clearly undermined the agency's findings. (Petition, p. 11). But there cannot be the slightest suggestion that the Board's findings were undermined because of alleged slight cost increases which, in fact, were more than covered by contingency allowances.

It may be noted, incidentally, that actual experience tends to show American's cost estimates to have been conservative and therefore underscores their intrinsic reliability. American's Forms 41 for the first six months of 1959, which are stipulated into the record, disclose that American's experienced jet costs have been lower than those estimated in

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its exhibits. Thus, as shown in Table A attached hereto, whereas American estimated that direct flight costs for the 707 would be $952.73 per ramp hour, experienced costs in the first half of 1959 have been only $936.47 per ramp hour. Moreover, the experienced costs are based on an average length of jet hop of 2,035 miles, whereas a New York-San Francisco nonstop involves a hop of 2,587 miles. Of course, the longer the haul the cheaper the operation.

2. Traffic

United asserts that the Board erred in finding that New York-San Francisco will generate 366,000 passengers in 1960. Similarly, United attacks the subsidiary findings that 1957-1960 traffic growth would amount to 10% per year and that traffic would be stimulated an an additional 10% in 1960 by the impact of jet operations. Each of these findings is, in fact, supported by the evidence.[1/]

As the Board pointed out, during the years 1952-1957 traffic in this market grew at an annual rate of over 12%. (Order No. E-14412, p. 8). The Board also recognized that 1957-1958 traffic growth did not amount to 10% because of the business recession, but that this was a temporary condition and, based on past experience, it must be assumed that this decline would soon be offset. American had pointed out in its Brief to the Examiner, at page 38, that the 12% yearly growth rate between 1952 and 1957 included the 1953-1954 recession, when traffic declined in San Francisco's major markets.

Furthermore, in attacking the Board's finding of a 10% jet stimulation factor, United blandly ignores its own

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[1/] United also attacks as too high the 1957 traffic base used by the Board in its projections. United's contentions were squarely rejected by both the Examiner and the Board -- both (continued)

(continued) preferring to rely on the Board's O & D Surveys rather than on United's unsupported judgment figures (Ex. U-110) -- and United has added nothing to its previous arguments.

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forecasts which assumed that jets would stimulate traffic by 12% in 1960. (Ex. U-110, p. 3). There was additional evidence showing the stimulating effect of speed increases on traffic to support the Board's findings on jet stimulation. (Exs. AA-91-93). Also, recent traffic statistics, covered by stipulation, lend additional, albeit unneeded, support to the Board's traffic findings. During the second quarter of 1959, New York-San Francisco averaged 901 daily passengers[1] --an increase of approximately 27% over the 1957 level of 708 daily passengers. (1957 O & D Surveys).

3. Schedules

Trans World and United continue to assert that each New York-San Francisco carrier must operate an inflexible pattern of three jet nonstop roundtrips per day throughout 1960, and that the Board's finding that a smaller pattern of service should be anticipated is contrary to the evidence. But the record is clear that although 9 daily jet nonstop round-trips would be necessary to accommodate the traffic predicted by American, such a pattern could be easily cut back if the traffic should not measure up to American's estimate. (American's Brief to Examiner, pp. 45-47). Actually, seasonal cutbacks have long characterized service in this market. In the summer of 1958 there was an average of 15 nonstop flights; by November, 1958, the average had dropped to 11. In sum, the Board's determination that it would be reasonable for the carriers to "tailor their services to the needs of the available traffic" is both sensible and in conformity with the record. (Order No. E-14412, pp. 11-12).

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[1] Forms 2787. Instead of surveying all passengers during two-week periods in March and September, as was done for Board Surveys

(continued) in the past, the carriers now tabulate every tenth ticket. To arrive at a total traffic figure, the figures submitted to the Board were multiplied by ten after deductions were made for ticket refunds.

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B. ADEQUACY OF SERVICE

The Board made the following findings, among others, on the adequacy of New York-San Francisco services: (1) between September, 1954 and March, 1957 Trans World and United failed to increase New York-San Francisco nonstop service despite rising traffic; (2) coach schedules were extremely limited during this period; (3) load factors were high during this period and remained high even following the sudden increase in nonstop schedules after March, 1957; (4) the market has not received vigorous competition in the past because of Trans World's failure to match United in quantity and quality of service; (5) there has been no satisfactory explanation for the abnormal increase in nonstop schedules after American filed its motion for an expedited hearing. (Order No. E-14412, pp. 13-16).[1] These findings are more than sufficient to support the Board's conclusion that service in this market had been inadequate.

Petitioners seek to blunt these findings on service inadequacies by alleging a pre-March, 1957 equipment shortage, said to be induced by manufacturers' delays in delivering new equipment. (UAL Petition, pp. 13-14; TWA Petition, p. 18).

But this argument misses two essential points. First, Trans World and United had transcontinental nonstops long before March, 1957. But because they did not have adequate nonstop equipment, they decided to concentrate their services in such markets as New York-Los Angeles where they faced nonstop competition from American, and to ignore New York-San Francisco

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[1] In addition, the Board adopted numerous other findings of the Examiner on service inadequacies. (Order No. E-14412, p. 2; Initial Decision, pp. 8, 20, 28, 29-30, 44).

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almost entirely. Thus, in March, 1957 Trans World operated a total of 155 New York-Los Angeles nonstop flights compared to only 31 New York-San Francisco nonstops. (Ex. AA-56). Moreover, the heavy increase in New York-San Francisco nonstop schedules after March, 1957 was unique. No similar bulge in nonstop service occurred in any other top market served by Trans World and United. (Ex. CCSF-17). In short, Trans World and United met the needs of other major markets, where competition was keener, at the earliest possible date and left New York-San Francisco to the last.

Second, the equipment shortages of which Trans World and United complain were attributable not to manufacturers' delivery lags, but to management misjudgments. United's policy witness explained that, in the early 1950's, United made equipment plans with the expectation that after the Korean War there would be a reversion in traffic growth to something approaching prewar experience. But as the witness himself stated, "post war Korean War conditions, however, did not turn out as expected". In other words, United miscalculated traffic growth. (Ex. U-D, pp. 14-15). Trans World, on the other hand, committed itself in the early 1950's to the purchase of 1049-G aircraft with the expectation that they would be equivalent to the DC-7. These expectations did not materialize and in 1954, a year after the inauguration of transcontinental nonstop service, Trans World found it necessary to purchase a new transcontinental aircraft -- the 1649 A jet-stream -- the first of which was not delivered until mid-1957. (Ex. AA-632).

Under our private enterprise system management is, of course, entitled to make mistakes. But by the same token such mistakes emphasize the importance of adequate competition. For in the final analysis, adequate competition is the best

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protection which can be given the public against repetition of errors by management.

C. DIVERSION

Trans World and United contend that the Board was required to adopt their extreme diversion estimates. But the estimate adopted by the Board was certainly supported by the evidence and consistent with its approach in other recent cases, including the Great Lakes-Southeast Case. (Order No. E-13211, November 28, 1958, pp. 23-24). Moreover, petitioners' predictions of dire consequences fly in the face of striking traffic and financial gains which they have achieved this year and which are reflected in their own reports to the Board stipulated into this record. Thus, Trans World's and United's passenger-miles for the first six months were at all-time highs, registering gains of 22% and 7% respectively over the corresponding period for 1958. (Forms 41). It is apparent, therefore, that any substantial dilution of the petitioners' San Francisco-New York revenues--which the Board properly found would not occur--not only would be more than offset by public interest considerations but could have no significant impact on petitioners' over-all financial positions.

D. SELECTION OF CARRIER

Northwest argues first that American's average New York-San Francisco traffic participation of 17% is insufficient for the Board to have found that American has an historic interest in this market. This contention is both frivolous on its face and contrary to the claim asserted successfully by Northwest in the Great Lakes-Southeast Case that "historical interest dictates that the carrier selected should be the one who can demonstrate substantial participation in the traffic flows to be benefited . . . ." (NWA Brief to Board, Jan. 13, 1958, p. 21).

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Northwest also argues that its "need" for strengthening should have been allowed to overshadow all other choice-of-carrier considerations. This contention is transparently incompatible with traditional concepts of public convenience and necessity and has been so regarded by the Board. (See, e.g., St. Louis-Southeast Case, Order No. E-13026, September 30, 1958, pp. 7-8). Moreover, Northwest has ignored the recent steps taken by the Board to strengthen its system. Thus, Northwest has already enjoyed substantial traffic increases as a result of its new Chicago-Miami award; in the first 6 months of 1959 Northwest enjoyed a 38.8% increase in passenger-miles over the corresponding period in 1958. (Forms 41).

II. TRANS WORLD AND UNITED HAD A FAIR HEARING.

Trans World and United, but not Northwest, charge that the Board's decision must be set aside for procedural defects, primarily for alleged improper ex parte representations by American, San Francisco and the Port of New York Authority. The charge rests on distortions of some 280 pages of documents copied from the Board's public correspondence file in this case and attached to the Trans World petition as an appendix.

But Trans World and United have not described fairly the Board's public correspondence file or analyzed correctly the very communications in that file on which they rely. Instead, each has sought to pile misconception on misconception and by the repetition of inaccurate and inflammatory descriptions and characterizations to create an atmosphere of impropriety and irregularity where none exists. In point of fact, examination of the communications themselves show that there were no ex parte representations and that the petitioners' sweeping allegations to the contrary are false. What the Board has before it then is simply another in a long series of efforts

by Trans World and United to persuade the Board not to carry out what two separate Examiners and Bureau Counsels have urged--

immediate removal of the one-stop restrictions on American's San Francisco-New York service.

A. THE TRANS WORLD AND UNITED PETITIONS DO NOT COMPLY WITH THE BOARD'S RULE 37(b) GOVERNING PETITIONS FOR RECONSIDERATION.

Insofar as they deal with communications found in the Board's public correspondence file for this case, the petitions of Trans World and United must be denied, if for no other reason, because they fail to comply with Rule 37(b) governing petitions for reconsideration of Board orders. That rule states in part:

> "If the petition is based, in whole or in part, on new matter, such new matter shall be set forth, accompanied by a statement to the effect that petitioner, with due diligence, could not have known or discovered such new matter prior to the date the case was submitted for decision." [I.e., date of oral argument to the Board].

The rule thus requires that new allegations in a petition for reconsideration must be accompanied by a statement that they could not reasonably have been made at an earlier date. The petitions here violate that rule. Their allegations about communications in the public correspondence file had not been made previously; yet, neither petition makes any statement as to why this could not have been done. Moreover, most of the communications had been available for public inspection in the Board's files since 1957.

Prior to the filing of the instant petitions neither Trans World nor United had raised any objection or question concerning documents in the Board's public correspondence file. Neither petitioner sought to introduce any evidence on that score, even though approximately 80% of the communications which petitioners now attack were present in the Board's public files long before the start of the evidentiary hearings.

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Neither Trans World nor United referred to any such correspondence in their briefs to the Examiner, in their exceptions to the Examiner's initial decision, or in their briefs and oral arguments to the Board. Nor did they make any reference to these items in their motions to reopen the record, addressed first to the Examiner three months after the conclusion of the evidentiary hearing and then to the Board in their briefs. It is clear, therefore, that the charges of improprieties based on communications in the Board's public correspondence file are indeed new matters.[1]

Since the propriety of these communications had not previously been challenged, each petition for reconsideration should have included, as required by Rule 37(b), "a statement that petitioner, with due diligence, could not have known or discovered such new matter prior to the date the case was submitted for decision". Neither petition contains such a statement and hence each is fatally defective.[2]

Moreover, no such statement could have been made in good faith because the communications upon which petitioners rely had long been in the Board's public correspondence file for this case--a file which is, and has been, open for public inspection at all times at the Board's office. Trans World and United cannot be said to have been unaware of the existence of these public files.

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[1] The general allegations in the petitioners' briefs and exceptions about alleged ex parte improprieties do not save the petitions. To be preserved a point must have been made with sufficient clarity to indicate the precise nature of the allegations. See Marshall Field & Co. v. NLRB, 318 U.S. 253, 255 (1945). No such reference was made here. There was no way for the Examiner, the opposing parties or the Board to know that petitioners intended to rely upon the contents of the Board's correspondence file.

[2] Petitioners cannot cure these defects by now asking the Board to include in the evidentiary record documents which might have been introduced at the hearing. (See Rule 24(j)). Furthermore, not having been subjected to the usual evidentiary safeguards, such documents should be left in the Board's public correspondence files, where they are neither evidence nor pleadings. Petitioners' rights in any court proceeding are protected by the 280-page attachment to Trans World's petition--an attachment to which American has not objected despite the fact that it far exceeds the 25-page limitation imposed by Rule 37(a).

The purpose of Rule 37(b) is, of course, to assure expeditious and orderly disposition of cases and to prevent the hoarding of grievances and complaints until after a case is before the Board, as had occurred here. Such basic disregard of the Board's rules should not be countenanced, particularly here where the case was instituted as an expedited proceeding.

B. THERE WERE NO IMPROPER COMMUNICATIONS

1. General

In appraising the charges of improprieties, several facts should be kept in mind at the outset.

First, there is no allegation or suggestion of venality or corruption of any kind on the part of any party, staff member, Examiner or Board member.

Second, there is no allegation or suggestion of any improper personal meeting, contact or correspondence between any representative of American and any Board member, staff member or Examiner.

Third, the communications of which petitioners complain were written, public documents; they were not clandestine in any sense of the word.[1] All were available for public inspection in the Board's own public correspondence file maintained by the Board's Docket Section. Many of the authors of the letters indeed had requested specifically that they be made public; none asked for, or received, confidential treatment.

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[1] Petitioners do allege telephone calls by Congressmen prior to the start of the case. But the propriety of such calls is not subject to serious challenge. (See infra, pp. 14-16 [5192-5194])

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These three factors alone distinguishthis case from all of the FCC court cases on ex parte representations which petitioners cite.[1]

2. The Nature of the Board's Correspondence File

The documents alleged to constitute improper ex parte representations were communications lodged in the Board's public correspondence file. As contents of that file, they were not pleadings, evidence, or arguments to be considered by the Board in disposing of the case. None of the communications was sent by American. In accordance with its long practice, whenever a communication--other than pleadings, exhibits or briefs--relating to this case was received by the Board, it, together with the Chairman's routine acknowledgment, was promptly filed in the public correspondence file. Each case has such a file. The file is available for public inspection in the office of the Board's docket section during all office hours.

The Board's public correspondence files serve two useful purposes. They provide a convenient way of handling and organizing correspondence, particularly from Congressmen, and they make available to all parties all communications which may have reached the Chairman, or any other Board member, from third persons. This, of course, gives the parties an opportunity to meet such contentions, if they so desire, in their

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[1] Each of the FCC cases involved private communications with a Commissioner by an applicant, his agent, or persons with a direct pecuniary interest in the outcome of the case. Massachusetts Bay Telecasters v. FCC, 261 F.2d 55, 65-66 (D.C. Cir. 1958) (a series of private conferences between representatives of various applicants and a Commissioner after the close of the evidentiary hearing); Sangamon Valley Corp. v. U.S., 358 U.S. 49 (1958), remanded, U.S. Court of Appeals for the District of Columbia, May 8, 1959 (personal visits paid and gifts and letters sent by a prospective licensee to the Commissioners); WIRL Television Corp. v. U.S., 358 U.S. 51 (1958) (private communications between a Senator owning stock in an applicant and Commissioners); WORZ, Inc. v. FCC, 268 F.2d 889 (D.C. Cir. 1959) (statements privately made to a Commissioner concerning (cont'd.)

(continued) the qualifications of one of the applicants). In WKAT, Inc. v. FCC, 258 F.2d 418 (D.C. Cir. 1958), there was a strong suggestion of venality as well as personal visits by an applicant's representative with a Commissioner (See also Examiner Stern's initial decision on remand, 17 P&F 1001 (1958).

own pleadings, briefs and arguments. Of course it is the denial of an opportunity to rebut which is the vice of true ex parte representations.[1] Indeed, the establishment of public correspondence files, such as those long maintained by the Board, has been urged as a remedial step by Congressmen concerned with problems of ex parte representations.[2] It would thus be ironic if this long-standing Board practice--generally considered to minimize ex parte representations--were now held to be improper.

3. Communications in the Board's Correspondence File Dated Prior to Start of This Proceeding

The fundamental baselessness of petitioners' allegations is underscored by their heavy reliance on communications in the Board's public correspondence file dated prior to January 13, 1958, the date on which the Board first ordered American's application set down for an evidentiary hearing. (Order No. E-12103). Approximately 200, or 80%, of the pages attached to Trans World's petition belong in this category. Petitioners would have the Board believe that there were improper ex parte communications concerning the New York-San Francisco Case even before there was such a case.

This view is not the law. The Board's rule on ex parte representations -- which reflects the prevailing court rule -- applies only to matters requiring notice and hearing. Rule 300.2 of the Board's Rules of Practice makes this point

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[1] Sangamon Valley Corp. v. U. S., U. S. Court of Appeals for the District of Columbia, May 8, 1959.

[2] A prime example is the original "Harris Bill", (continued)

(continued) Section 224(a) of which would prohibit off-the-record communications with an agency only where there is intention that other parties "will not receive knowledge of such communications". H.R. 4800, 86th Cong. 1st Sess. (1959). Section 225 (a) would require the agency, on receipt of any off-the-record communication, to "promptly place it in the public file of the proceeding"--precisely the practice which the Board normally follows and which it followed here.

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explicitly. But the initiation of route cases does not require prior notice and hearing because such an order does not and cannot prejudice any person or any carrier. The mere start of a route case does not assure additional competition in any market; the grant of such authority can only come at the conclusion of a full-scale evidentiary hearing.

The FCC cases cited by petitioners are clearly distinguishable. (See p. 13, n. 1, supra). In all but one of those cases, the alleged ex parte communications were not only private, but also occurred after the commencement of an evidentiary hearing. The lone exception was a rule-making proceeding, to which the court nonetheless applied the ex parte rule because adoption of the proposed rule would have had as great an economic impact on the parties involved as would the outcome of an adjudicatory proceeding. Sangamon Valley Corp. v. U.S., 358 U.S. 49 (1958), remanded, U.S. Court of Appeals for the District of Columbia, May 8, 1959.[1] Here, however, the order initiating the case did not enhance or injure any party's position on the merits of whether or not there should be an additional nonstop carrier.

Furthermore, in carrying out its broad discretionary control over the docketing route applications,[2] the Board has never sought to seal itself off from the public as petitioners seem to suggest. Such isolation would be incompatible with the carrying out of the Board's public interest responsibilities. Rather, carriers, civic groups, Congressmen, and individual citizens have been encouraged, and properly so, to confer with

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1/ The Sangamon case involved the allocation of frequencies as between several localities. The rule adopted by the FCC would necessarily prejudice private applicants situated in localities not receiving the allocation. If their locality were not assigned the frequencies by Commission rule, the private applicants for licenses were foreclosed from getting a license.

2/ Civil Aeronautics Board v. State Airlines, 338 U.S. 572, 576 (1950). See also Federal Communications Commission v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 272 (1949).

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Board and staff members about possible new route proceedings involving points in which they are interested. These informal procedures have been the precursors of a number of past route cases, one example of which is the current Southern Transcontinental Route Case, Docket No. 7984.

Thus, on all counts--judicial principles and Board rules and practice--the conference between Board members and San Francisco representatives, prior to the start of the case, was proper. TWA and United cannot claim injury because, as we have noted, the subsequent institution of the proceeding did not prejudice objections to additional competitive San Francisco-New York services. Moreover, by promptly making public a transcript of the conference the Board enabled petitioners to meet all of the contentions urged by San Francisco at the conference.

In short, no ex parte problem could conceivably have existed prior to the January 13, 1958 date of Order No. E-12103 and there is accordingly no need to consider further the documents in this period.

4. Communications in the Board's Public Correspondence File Dated After Start of this Proceeding

Of the communications contained in the Trans World appendix, 66 were dated after January 13, 1958, the start of the case, and of these only half were communications to the Board; the others were communications from the Board. Virtually all were written by

Congressmen; none was written by any representative of American. The only communication written by any party was one sent by San Francisco on a purely procedural matter, a matter which the Board resolved in favor of Trans World and United. (TWA App., p. 84).[1] The documents do not indicate any improper personal contact of any kind between any

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[1] All citations are to the portion of Trans World's Appendix following the dividing page.

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Board or staff member and Trans World and United make no allegations to that effect.

(a) *Procedural Matters*

A number of the communications dealt only with procedural matters--*e.g.*, procedural dates, the site of the hearings. (*E.g.*, pp. 74, 86). None was sent by American. These cannot properly be termed ex parte representations because they did not concern the merits and all were promptly made public by the Board. (See Rule 300.2).

Furthermore, Trans World and United were not prejudiced by any such communication. In every instance, the accelerated timetable which the writers requested was rejected by the Board. In other words, on all the procedural matters concerning which communications were addressed to the Board the views of Trans World and United prevailed.

(b) *Routine Transmittals by Congressmen*

Still other communications from Congressmen consisted of routine transmittal letters or slips asking for assistance from the Chairman or the Board in answering a constituent's letter. (*E.g.*, pp. 45, 56). The transmittals uniformly contained no expression of the Congressmen's interest, if any, in the outcome of the case. It is a matter of common knowledge that every government agency receives many such inquiries. They were handled by the Board in this case, as in other Board cases, in strictly routine manner. Most important, they were put into the public correspondence file, for all interested parties to inspect if they so desired. The Board has been handling such inquiries in this fashion for a long time; it must be presumed therefore that the Congressmen were aware, and intended, that their inquiries would be made available to the public by the Board.[1]

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[1] One routine transmittal was made by a Senator after the date of oral argument. (P. 2). But the Senator made no representation as to the merits of the case; moreover, the enclosure had been mailed to the Senator by a constituent well before April 29, 1959, the date of oral argument.

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(c) On the Merits

A few letters in the public correspondence file, sent to the Board in connection with the April 29 oral argument, did contain representations on the merits. (E.g., pp. 30, 37, 38-39, 41-43). But these letters, none of which had been sent by American, cannot be considered ex parte communications because they were not made in clandestine fashion, were a matter of public record and were covered by the Board's own rules. Indeed, almost without exception the writers requested that their statements be made public, a request with which the Board complied promptly.

Rule 14 permits any member of Congress to appear at oral argument whether or not he appeared at the evidentiary hearing and it has been the Board's practice to permit Congressmen to participate in those proceedings. Moreover, the Board, in the past, has often permitted, with the acquiescence of the carriers, the inclusion of such statements in the public record even though the Congressman involved was not physically present at oral argument. Here, at oral argument counsel for Trans World and United were informed of the Chairman's intention to make such incorporations. (Tr. 2). Not only did they interpose no objection to this procedure; they did not even seek to inspect the documents in question. Under these circumstances, the Chairman had every right to have the Congressional statements put into the public correspondence file.

5. Public Correspondence Files in Other Cases

The documents appearing in the public correspondence file in this case are closely analogous to those appearing in similar files for other recent route proceedings. As a matter of fact, the number of such communications to the Board was substantially less in this case than in other cases of comparable

interest. For example, in the Great Lakes-Southeast Case, Docket No. 2396, there were three volumes of such correspondence compared with only one in the instant proceeding. Similarly, in the New York-Florida Case, Docket No. 3051, there were a total of over 5,000 signatures appearing on communications to the Board involving that case --a number many times in excess of similar signatures here.

In the appendix attached to this answer we have included copies of typical communications to the Board appearing in the public correspondence files in recent cases--St. Louis-Southeast Case, Docket No. 7735; Service to Phoenix Case, Docket No. 6247; and the Great Lakes-Southeast Case, Docket No. 2396.[1/] These communications show that the Board's procedure in handling outside communications in this case was the same as that which it followed consistently in other recent cases. Moreover, the communications of which petitioners complain are of the same type as were involved in the other cases.

As a matter of fact, in the St. Louis-Southeast Case, now under review in the Court of Appeals, as page 18 of the Appendix hereto shows, a Senator wrote to the Board subsequent to oral argument--without serving copies on the parties and without asking that his letter be made public--in support of an award to Trans World. It is apparent that the Board did not consider this to be an improper ex parte representation precluding or nullifying any award to Trans World. The same standards are applicable here, particularly since the communications on the merits -- unlike that of a Senator in the St. Louis-Southeast Case -- were dated prior to the conclusion of oral argument. By the same token, if the Board should now reverse its position with respect to the contents of its public

correspondence files, it would be required a fortiori to ask the Court of Appeals for the District of Columbia for an order remanding the St. Louis-Southeast Case to the Board for further proceedings and upon such remand to set aside its own award to Trans World in that case.

6. Petitioners' Offers of Proof and Affidavits

Trans World's belated offer of proof (Petition, p. 7) and United's belated affidavits (Petition, App. A) likewise provide no basis for reversal of the Board's prior decision. If true, they would show only that American had persuaded certain travel agents to write their Congressmen about San Francisco-New York air authorizations and service. There would have been nothing intrinsically wrong in this.

As to those letters written by agents prior to the start of the route case--which comprise the great majority of the agents' letters--no ex parte problem whatsoever is presented because, as we have pointed out, the mere setting of American's route application for hearing did not prejudice either Trans World or United and hence did not require prior notice and hearing. (Supra, pp. 14-16).

There was likewise nothing improper about the few travel agents' letters which were sent after the start of the case. For one thing, all of the letters in this category were sent shortly before oral argument. Since Congressmen were authorized under Rule 14 to appear at oral

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1/ The appendix contains only a small, random sampling of the many communications in the public correspondence files for these cases.

argument, it would be perfectly appropriate for interested constituents at that time to seek the open support of their Congressmen. The fact that the Congressmen apparently did not choose to appear at the argument but merely transmitted the agents' letters to the Board without comment does not convert the constituent's letter into an improper representation. By the same token, since the

few agents who wrote had a direct and legitimate interest in writing the Congressmen, there would have been nothing improper about American seeking to persuade the agents to that effect. In any event, all of the agents' letters to the Congressmen--whether written before or after the start of the route case--were all promptly made available for public inspection by the Board.

C. MISCELLANEOUS

1. Production of Board's Staff Study Was Not Required.

Trans World and United claim that they were prejudiced by the Examiner's refusal to order the production of a staff study of the San Francisco-New York nonstop market completed prior to the setting of American's application for hearing. (TWA Petition, pp. 15-16; UAL Petition, pp. 19-20). But there was no showing that the lone witness for the Bureau of Air Operations was the author of the study; hence, there was no basis for ordering its production. Nor did petitioners show how the study was otherwise material, or why its production was necessary.

2. Mr. Hector Was Entitled to Participate in the Board's Decision.

The claim that Mr. Hector had no right to vote on the disposition of this case because he was not present at oral argument is frivolous. Sisto v. Civil Aeronautics Board, 179 F.2d 47 (D.C. Cir. 1949), is controlling. There, the Court of Appeals noted that Section 421 of the Act provides that "three members shall constitute a quorum of the Board." The Court went on to hold:

> "In the plain words of the statute [Sec. 1004(a)] the Board may 'hear or receive' argument. This does not bind them to do it in any particular manner. They may do it in either one of the two ways stated, viz., hear it or receive it. If a quorum does not hear, the quorum requirement may
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> [5200]
>
> still be met by having the requisite additional number receive. The record demonstrates that this is exactly what was done in this case before final decision was made. A quorum either heard or received argument either by being physically present or by reading the record and transcript." 179 F.2d at 54 (emphasis added).

Furthermore, in the instant case neither counsel for Trans World nor United objected to Mr. Hector's participation in the decision even though both were admittedly aware of his absence at oral argument.

3. The Allotment of Time at Oral Argument Was Proper.

The charge of unfair allocation of time as between the Congressmen and the petitioners has been disposed of by the Board's decision on reconsideration in the Great Lakes-Southeast Case. (Order No. E-13835, May 7, 1959, p. 2, n. 2).

CONCLUSION

American respectfully requests the Board to: (1) deny the petitions of Northwest, Trans World and United for reconsideration of Order No. E-14412; (2) deny the request of United for the incorporation of the public correspondence files into the evidentiary record; (3) deny the request of Trans World for a stay of the aforesaid Order No. E-14412.

Respectfully submitted,

/s/ Howard C. Westwood
/s/ John W. Douglas
/s/ Edwin H. Seeger
Attorneys for American Airlines, Inc.

October 2, 1959

[5201]

TABLE A

COMPARISON OF AMERICAN'S ESTIMATED AND EXPERIENCED 707 DIRECT COSTS PER RAMP HOUR

Acct. No.		Estimated (Ex. AA-82)	Forms 41 Jan.-June 1959
5100	Flying Operations Expense		
	Crew Salaries and Related Expenses		
	Crew Pay	$ 57.22	$ 77.44
	Vacation and Training	5.15	-
	Related Payroll	8.11	8.37
	Travel and Incidental	4.25	7.82
	Sub-Total	$ 74.73	$ 93.63
	Fuel	$282.76	$233.42
	Oil	7.48	2.40
	Engine Rental	-	-
	Insurance and Other	22.11	64.03
	Total (5100)	$387.08	$393.48
5200	Direct Maintenance-Flight Equipment	$219.88	$158.37
5300	Maintenance Burden-Flight Equipment	167.47	100.68
7000	Depreciation-Flight Equipment	178.30	283.94
	Total Direct Flight Expense	$952.73	$936.47
	Average Length of Hop	2,587	2,035

[Received October 8, 1959, CAB]

REPLY OF UNITED AIR LINES, INC., TO ANSWER OF AMERICAN AIRLINES, INC.

United Air Lines, Inc., in reply to the answer of American Airlines, Inc., to petitions for rehearing, reargument and reconsideration heretofore filed in the above entitled proceeding represents and alleges as follows:

Notwithstanding the fact that American consistently opposed United's efforts to reopen the record to receive cost data based on actual jet operations, American in its Answer has resorted to precisely such information. However, examination discloses that cross-examination with respect to that information is necessary if any reliance is to be placed upon it by the Board.

American's aircraft operating cost figures for the period from January through June 1959 contained in Table A attached to its answer, were derived from data reported for the first two quarters of the year. American's aircraft operating expense as reported for each of these quarters separately is as follows:

[5305]

AMERICAN'S REPORTED AIRCRAFT OPERATING EXPENSE PER RAMP HOUR

	First Quarter 1959	Second Quarter 1959
Flying Operations		
Crew Salaries and Related	$ 90.74	$ 94.26
Fuel	245.44	231.21
Oil	1.67	2.54
Other	107.78	55.49
Direct Maintenance		
Airframe	92.33	45.26
Engine	55.76	56.46
Reserve	158.09	27.77
Depreciation - Flight	431.42	255.21
Maintenance Burden	132.78	94.45

(Forms 41)

The wide variations shown in the foregoing table to have occurred between the first and second quarters in a number of categories of expense, including "Flying Operations - Other", "Airframe Direct Maintenance", "Direct Maintenance Reserve" and "Maintenance Burden," obviously require inquiry. Likewise, the variation (not apparent from the table) in Maintenance Burden from 43.4% to 72.9% of Direct Maintenance Expense between the first and second quarters, respectively, also requires inquiry. Moreover, direct maintenance expense for a comparatively short period may not accurately reflect annual results because those expenses in any period may be affected by the manner in which maintenance is scheduled. In view of these circumstances, American's figures would have to be tested by cross-examination before the Board could place any reliance upon them.

It also should be noted that TWA's and National's reported aircraft operating expenses for Boeing 707 equipment during the first 6 months of 1959 amounted to $1,019.15 and $1,129.64 per ramp hour, respectively (Forms 41). It may well be that TWA's expense, for example, will be more typical than American's reported first 6 months' experience. In any event, the difference between American's and TWA's reported costs in these respects further emphasizes the need for cross-examination before any reliance is placed on American's data by the Board.

Respectfully submitted,

/s/ Floyd M. Rett

H. TEMPLETON BROWN
JOHN T. LORCH
FLOYD M. RETT

* * *

Attorneys for UNITED AIR LINES, INC.

* * *

Dated: October 7, 1959

[5332] E-14586

ORDER GRANTING FURTHER ORAL ARGUMENT AND DENYING STAY

By order E-14412, dated September 2, 1959, the Board authorized American Airlines, Inc. (American), to provide nonstop service between New York and San Francisco in competition with Trans World Airlines, Inc. (Trans World), and United Air Lines, Inc. (United). The application of Northwest Airlines, Inc. (Northwest), for authority to provide similar service was denied. Petitions for reconsideration and for other relief, including a stay, have been filed by various parties, and counterpleadings have been received.[1]

Trans World and United urge that the Board's order rests upon certain substantive and procedural errors, including, among others, denial of a fair hearing by reason of ex parte communications made or inspired by American, San Francisco, and Port of New York Authority, and by other efforts of these parties to bring pressure or influence to bear upon the Board. Petitioners claim that the alleged ex parte communications and efforts to solicit and inspire pressure resulted in violations of Rule 2(a) and (c) of the Board's Principles of Practice, and Rules 18 and 24(j) of the Rules of Practice, the legal effect of which is alleged to necessitate vacation of Order E-14412 and a hearing *de novo* or, in the alternative, a reopening

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[1] Trans World filed a petition for vacation of Order E-14412 and termination of the proceedings or, in the alternative, reopening with a preliminary hearing and stay of the order. United filed petitions for rehearing, reargument, and reconsideration, and for a stay of the order. A petition for reconsideration has been filed by Northwest. Answers to the three petitions for reconsideration have been filed by American, Public Utilities Commission of the City and County of San Francisco, San Francisco Chamber of Commerce, Port of Oakland, and, to Northwest's petition, by Trans World and United. United has requested leave to file a reply to American's answer, and such request has been opposed by American. Answers to United's petition for stay have been received from American, City and County of San Francisco, San Francisco Chamber of Commerce, and Northwest. The Port of New York Authority has filed a motion to strike portions of the Trans

(continued) World and United petitions, and answers thereto have been submitted by those two carriers.

[5333]

of the proceeding with a preliminary hearing to determine the facts as to ex parte activity and its effect upon the qualifications of the applicants and the Members of the Board. If the latter course is chosen by the Board, petitioners request that the effectiveness of Order E-14412 be stayed.

While it is requested that the qualifications of Members be made a subject of the preliminary hearing, there is no allegation of any personal misconduct on the part of any Member in regard to his vote on the application, or otherwise. The pleadings appear to bring the Board's qualifications into question only insofar as the alleged campaign of pressure might be shown to have had some effect on the judgment of any Member.

The Board, upon consideration of the matters raised in the petitions and answers and other pleadings relating thereto, has decided to entertain oral argument to determine whether and to what extent the allegations of violations of the Principles of Practice and Rules of Practice justify further action in this proceeding, and if so, what action should be taken. In this regard, the Board wishes the argument to be addressed, among other things, to the questions (a) whether the allegations establish a prima facie case of violation of the Principles of Practice or Rules of Practice and (b) to what extent, if any, the alleged conduct affects the qualifications and comparative fitness of applicants, and the validity of the proceeding.

The Board has further decided that its inherent power to modify a certificate prior to final disposition of the proceeding in which it is issued should be made explicit by reissuing the certificate granted herein subject to a defeasance clause, so that in the event that, at the conclusion of further proceedings herein, any action is required to terminate the New York-San Francisco nonstop authority previously granted, no color of claim will exist that the Board is powerless to do so.[2] On the question of staying this certificate, the Board has determined to deny this request.

With respect to the petitions for rehearing, reargument, and reconsideration (except for those issues upon which oral argument is being granted here), Chairman Durfee and Member Denny have voted to grant the petitions, whereas Vice Chairman Gurney and Member Minetti have voted to deny them. Accordingly, such petitions (with the exception already noted) fail for want of a majority. The views of the Members in this regard will appear at a later date.

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[2] The Board is convinced that the express reservation of this power is unnecessary, but is making such a reservation here in view of the pending litigation in Delta Air Lines, Inc., v. C.A.B., Case 25,852, United States Court of Appeals for the Second Circuit.

ACCORDINGLY, IT IS ORDERED:

1. That further oral argument in this proceeding on the matters set forth above, be held on November 17, 1959, at 10:00 a.m. in Room 1027, Universal Building, Florida and Connecticut Avenues, N. W., Washington, D. C.

2. That the amended certificate of public convenience and necessity issued to American Airlines, Inc., for Route 4 pursuant to Order E-14412, dated September 2, 1959, be and hereby is canceled.

3. That an amended certificate of public convenience and necessity in the form attached hereto be issued to American Airlines, Inc., for Route 4, that said amended certificate shall be signed on behalf of the Board by the Chairman, shall have affixed thereto the seal of the Board attested by the Secretary, and shall be effective on November 1, 1959.

4. That the petitions for a stay, and, except with regard to the

matters set forth above for further proceedings, the petitions for rehearing, reargument, and reconsideration be and hereby are denied.

By the Civil Aeronautics Board:

/s/ Mabel McCart
Acting Secretary

(SEAL)

Durfee, Chairman, and Denny, Member, filed the attached joint concurrence. Gurney, Vice Chairman, filed the attached separate concurrence.

[5335]

DURFEE, CHAIRMAN AND DENNY, MEMBER, CONCURRING.

We concur with the decision to direct oral argument on the allegations of violations of the Board's Principles of Practice and Rules of Practice.[1/]

We would have preferred to couple this action with a stay of the effective date of the certificate awarded by the Board in this case pending a decision on the issues set down for argument. However, we have refrained from dissenting as to the stay question in order to obviate what otherwise would be an equally divided vote on this issue which would also have precluded the one action we consider absolutely essential in this case - a further inquiry into new charges made by Trans World and United Air Lines that bear on the qualifications of the successful applicant and the validity of the proceeding in toto. We can concede, however reluctantly, to the denial of a stay since we are satisfied that the Board retains full power to take appropriate action as to the certificate should further inquiry establish the need for action.

Needless to say, on the basis of our dissent from the Board's original decision in this case, we think the award of the certificate should be reversed, not merely stayed. But, granting the soundness of the Board's original decision for the sole purpose of considering the stay request, in our opinion the rationale of the majority decision still provides no support for the denial of a stay here. The Board's entire decision was predicated on a forecast of 1960 conditions. In particular, the majority's findings that the market could support three carriers assumed traffic growth that will only be realized with the passage of the full calendar year 1960 - and thus for purposes of considering a stay, and assuming the correctness of the majority's forecast growth factor, we are dealing with a market that would be some 10 to 15% smaller, one that will not support three carriers even on the majority's rationale.

There is no finding in the Board's decision that then current service was inadequate - on the contrary, the alleged inadequacies relied upon by the majority were said to have occurred in 1957.

1/ As noted in the Board's order with which we are concurring, we would have granted the petitions for rehearing, reargument and recommended action for the reasons stated in our dissent to the Board's decision in Order E-14412.

Furthermore, the New York-San Francisco market now has jet service from both of the presently authorized carriers - rather than only one, as was true as of the date of the decision.

On the other hand, the impact of the diversion anticipated by the majority will be even more devastating in the immediate future period during which any stay would be effective, in view of the fact that the market has not yet reached the level on which the decision was predicated and the fact that the carriers, and particularly United, are all at a critical state in the transition to jets in this market.

In short, we can see no public need for immediate inauguration of service by another carrier. In the absence of some immediate compelling public need, we think it would be more appropriate to vindicate the Board's process prior to permitting any party to profit from the decision. Initially, this would require a stay only until the Board hears oral argument and decides whether further procedures are necessary - a matter of a few weeks.

However, as we have pointed out, since the means for vindicating the Board's process will still be within the Board's power at the conclusion of any further proceedings, we can reluctantly concur in the denial of a stay in order to assure that the necessary steps are taken for a careful evaluation of the allegations made that the Principles and Rules of Practice have been violated.

/s/ JAMES R. DURFEE
/s/ HARMAR D. DENNY

[5337]

GURNEY, VICE CHAIRMAN, CONCURRING:

Upon careful review of the petitions for reconsideration and the answers thereto, it is my firm opinion that the Board should have decided the issue of ex parte representations on these pleadings without the necessity for oral argument. Since, however, a majority of the Board desires to hear argument on the ex parte allegations, I will give my careful consideration to any further statements which the parties will present at oral argument.

/s/ CHAN GURNEY

[5338]

Issued pursuant to
Order No. E-14586

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended)

for Route 4

- - - - - - -

AMERICAN AIRLINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the terminal point Los Angeles, Calif., the intermediate points San Diego, Calif., Phoenix, Tucson, and Douglas, Ariz., El Paso, Tex., and beyond El Paso, Tex., the intermediate points (a) Oklahoma City and Tulsa, Okla., and Nashville, Tenn., or (b) Midland-Odessa (to be served through Midland Army Air Field), Big Spring, Abilene, Forth Worth, and Dallas, Tex., Texarkana and Little Rock, Ark., Memphis and Nashville, Tenn., and

(a) Beyond Nashville, Tenn., the intermediate points Louisville, Ky., and Cincinnati, Ohio, and (i) beyond Cincinnati, Ohio, the intermediate points Dayton, Columbus, and Akron, Ohio, and the terminal point Cleveland, Ohio, and (ii) beyond Cincinnati, Ohio, the intermediate points Columbus, Ohio, Pittsburgh, Pa., and the coterminal points New York, N.Y., and Newark, N.J.,

(b) beyond Nashville, Tenn., the intermediate points Louisville, Ky., Cincinnati, Ohio, Huntington, Charleston-Dunbar, Parkersburg, Clarksburg, and Elkins, W. Va., Washington, D. C., Baltimore, Md., Wilmington, Del., Philadelphia, Pa., Newark, N. J., New York, N. Y., Bridgeport, New Haven, and Hartford, Conn.-Springfield, Mass., Providence, R. I., and the terminal point Boston, Mass.,

(c) beyond Nashville, Tenn., the intermediate points Knoxville, Tenn., Bristol, Roanoke, Lynchburg, and Richmond, Va.,

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Washington, D. C., Baltimore, Md., Wilmington, Del., Philadelphia, Pa., Newark, N. J., New York, N. Y., Bridgeport, New Haven, and Hartford, Conn.-Springfield, Mass., Providence, R. I., and the terminal point Boston, Mass.;

2. Between the coterminal points San Francisco and Oakland,

Calif., the intermediate points Phoenix, Tucson, and Douglas, Ariz., El Paso, Tex., and beyond El Paso, Tex., the intermediate points (a) Oklahoma City and Tulsa, Okla., and Nashville, Tenn., or (b) Midland-Odessa (to be served through Midland Army Air Field), Big Spring, Abilene, Fort Worth, and Dallas, Tex., Texarkana and Little Rock, Ark., Memphis and Nashville, Tenn., and beyond Nashville, Tenn., as described in "1" (a), (b), and (c) above;

3. Between the terminal point Milwaukee, Wis., the intermediate points Chicago, Peoria, and Springfield, Ill., St. Louis, Springfield, and Joplin, Mo., Tulsa and Oklahoma City, Okla., Dallas, Fort Worth, Abilene, Big Spring, Midland-Odessa (to be served through Midland Army Air Field), and El Paso, Tex., Douglas, Tucson, and Phoenix, Ariz., and (a) beyond Phoenix, Ariz., the intermediate point San Diego, Calif., and the terminal point Los Angeles, Calif., and (b) beyond Phoenix Ariz., the coterminal points Oakland and San Francisco, Calif.;

4. Between the terminal point Houston, Tex., the intermediate points Nashville, Tenn., Columbus, Ohio, and Pittsburgh, Pa., and the coterminal points New York, N. Y., and Newark, N. J.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate; and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points prior to the effective date of this certificate. Upon compliance with such procedure relating thereto as

may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein, other than a point required to be served through an airport named herein, through any airport convenient thereto, and render scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby.

[5340]

(3) The holder shall serve Milwaukee, Wis., only on flights originating or terminating at St. Louis, Mo., or a point west thereof.

(4) The holder shall serve San Diego, Calif., only on flights originating or terminating at Phoenix, Ariz., or a point east thereof.

(5) Except with respect to nonstop flights scheduled between San Francisco or Oakland, Calif., on the one hand, and New York, N. Y., or Newark, N. J., on the other hand, the holder shall serve San Francisco and Oakland, Calif., only on flights serving Dallas, Tex., Tulsa, Okla., or a point west of either thereof other than San Francisco or Oakland, California.

(6) The holder shall not render nonstop service (a) between Cincinnati, Ohio, and Philadelphia, Pa., and (b) between Charleston, W. Va., and Philadelphia, Pa., Newark, N. J., or New York, N. Y., and (c) between New York, N. Y., Newark, N. J., or Philadelphia, Pa., on the one hand, and Clarksburg, Elkins, Parkersburg, or Huntington, W. Va., on the other hand.

(7) Flights serving Dayton or Columbus, Ohio, on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve Nashville, Tenn.

(8) Flights serving Louisville, Ky., on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve (a) Nashville or Memphis, Tenn., or Dallas, Tex., or (b) Tulsa or Oklahoma City, Okla., and at least one additional intermediate point west of Tulsa.

(9) Flights serving Cincinnati, Ohio, on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve (a) Nashville or Memphis, Tenn., Dallas, Tex., or Chicago, Ill., or (b) Tulsa or Oklahoma City, Okla., and at least one additional intermediate point west of Tulsa.

(10) Flights serving Louisville, Ky., on the one hand, and Huntington and Charleston, W. Va., Washington, D. C., Baltimore, Md., or Wilmington, Del., on the other hand, shall also serve Cincinnati, Ohio.

(11) Flights serving Louisville, Ky., on the one hand, and Philadelphia, Pa., on the other hand, shall serve Cincinnati, Ohio, and one intermediate point between Cincinnati, Ohio, and Philadelphia, Pa.

(12) Flights serving Louisville, Ky., on the one hand, and New Haven and Hartford, Conn.-Springfield, Mass., Providence, R.I., and Boston, Mass., on the other hand, shall also serve both Cincinnati, Ohio, and one of the following points: Washington, D. C., Baltimore, Md., Wilmington, Del., Newark, N. J., or New York, N. Y.

(13) Flights serving Charleston, W. Va., on the one hand, and New Haven, Conn., Hartford, Conn.-Springfield, Mass., Providence, R. I., or Boston, Mass., on the other hand, shall also serve one of the following points: Washington, D. C., Baltimore, Md., Wilmington, Del., Newark, N. J., or New York, N. Y.

(14) Flights serving Nashville, Tenn., on the one hand, and Charleston or Huntington, W. Va., on the other hand, shall also serve Cincinnati, Ohio.

(15) Notwithstanding the linear route description in this certificate, the holder may serve the coterminal points San Francisco and/or Oakland, Calif., on the one hand, and Phoenix, Ariz., and points east thereof, on the other hand, on flights carrying property and mail only,

which also serve the intermediate points Los Angeles and/or San Diego, Calif.: Provided, That on such flights the holder shall not discharge at Los Angeles or San Diego property or mail which was enplaned in San Francisco or Oakland and shall not discharge at San Francisco or Oakland property or mail which was enplaned in San Diego or Los Angeles.

(16) The holder's authority to serve Huntington, W. Va., is suspended.

(17) The holder's authority to serve Texarkana, Ark., is suspended for the period during which Trans-Texas Airways is authorized to serve such point.

(18) Flights serving Houston, Tex., shall also serve Pittsburgh, Pa.

(19) Flights serving Pittsburgh, Pa., shall (a) also serve at least one of the following points: Memphis and Nashville, Tenn., Tulsa and Oklahoma City, Okla., Fort Worth, Dallas, and Houston, Tex., and (b) originate or terminate at (i) Tulsa, Okla., or Dallas, Tex., or a point west of either such point, or (ii) Houston, Tex.

(20) Flights serving Columbus, Ohio, on the one hand, and New York, N. Y., or Newark, N. J., on the other hand, shall also serve at least one of the following points: Memphis and Nashville, Tenn., Tulsa and Oklahoma City, Okla., Fort Worth, Dallas and Houston, Tex.

The exercise of the privileges granted by this certificate shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

[5342]

The authority in "(15)" above shall expire on August 11, 1954, or upon the date the temporary certificates of public convenience and necessity issued pursuant to the Board's Order E-3085, dated July 29, 1949, otherwise cease to be effective, whichever shall first occur.[1]

The authority to render nonstop service between San Francisco or Oakland, Calif., on the one hand, and New York, N.Y., or Newark, N. J., on the other hand, may be terminated by appropriate Board order, upon a determination by the Board, as the result of further proceedings in the New York-San Francisco Nonstop Service Case, Docket 9214 et al., that such authority should be rescinded.

This certificate shall be effective on November 1, 1959.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman, and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on the 27th day of October, 1959.

/s/ James R. Durfee
Chairman

(SEAL)

ATTEST:

/s/ Mabel McCart
Acting Secretary

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[1] American Airlines, Inc., has filed an application on February 8, 1954, Docket 6541, for continuation of the authority in "(15)" above.

[5343]

October 28, 1959

NEW YORK-SAN FRANCISCO NONSTOP SERVICE CASE
DOCKET 9214 ET AL.

NOTICE TO ALL PARTIES:

The following is the allotment of time and order of appearances for the oral argument directed by the Board in its order E-14586 of October 27, 1959.

	Time allotted (Minutes)
Trans World Airlines, Inc.(*)	40
United Air Lines, Inc.(*)	40
Northwest Airlines, Inc.(*)	10
American Airlines, Inc.	40
City of San Francisco, California	20
Port of New York Authority	20

(*) TWA, United, and Northwest may reserve a portion of their allotted time for rebuttal.

Please advise this office on or before November 12, 1959 of the name of counsel who will present this argument.

/s/ Francis W. Brown
Chief Examiner

[5345]

ORAL ARGUMENT

* * *

[5349]

ORAL ARGUMENT OF HENRY BEVANS

Mr. Bevans:

* * *

[5356]

First, it is said that the Board has always had a correspondence file available to the parties for inspection. Of course it has. And perhaps various courts in this country have, too. But until this proceeding we as counsel for TWA had never thought it necessary in defense of our client's interest to undertake such an inspection, either before this Board or before any court.

* * * *

[5359]

I submit, gentlemen, that all of these facts go far beyond a mere prima facie showing of the violations in this proceeding of the Board's principles and rules of practice.

Whatever else we might ever be able to prove in this connection, would be entirely cumulative. Now what should be done? Gentlemen, substantial violations of the Board's principles and rules destroy the appearance of fairness that

[5360]

those principles and rules were designed to assure in your proceedings. And nothing could be more important than that you undo without hesitation any result subject to any such implication of unfairness.

That idea is not, of course, original with me. It is implicit in the Route Case, in the Morgan Case, in the recent F.C.C. cases on appeal, the Louisville and Nashville Case in the Supreme Court, the Berkshire-NLRB Case, and many, many others.

And having set aside the order which, as we see it, is the only possible course at this point, the Board may then, on the basis of a record purged of ex parte representations, decide the basic issue of the need for a third carrier by procedures that meet all the time-tested criteria of the judicial processes.

* * * *

[5367]

STATEMENT OF H. TEMPLETON BROWN, ON BEHALF OF UNITED AIR LINES

Mr. Brown: * * *

[5373]

I have no doubt that a complete investigation of the source of inspiration for this campaign would find that substantially all letters written by members of Congress were written as a result of requests made to them by the interested parties. But such an investigation would do no more than provide added proof of what is already apparent.

* * * *

[5385]

* * * *

Mr. Leasure: Very strictly speaking, a technical violation. As a matter of fact, in my experience here I never looked at the correspondence file and you knew it was there because I thought it was so inconsequential, you would pay no attention to it. It wasn't until I saw this document that TWA filed that had this concerted attempt on the part of parties to do it, that I thought there was anything wrong with it. I would certainly have to say I knew the file was there. In the past I have answered many of the letters in connection with the file.

[5392]

* * * *

ORAL ARGUMENT OF HOWARD C. WESTWOOD

Mr. Westwood: May it please the Board:

Just by way of orientation I might point out that the position of the Petitioners now is that there is no need for any further evidentiary hearing on the issue presented with respect to these communications, that any additional evidence would be simply cumulative. The only thing that can or should be done is to start the case all over again, ab initio.

Now, therefore, we can look at this bundle of documents which TWA presented and the affidavits attached to United's petition as the basis, and the sole basis, for the contention that this entire proceeding is to be wiped out and we must start all over.

* * * *

[5396]

* * * *

Mr. Westwood: Sure. And you know why there is no such vigilance; do you know I don't look at the correspondence file, because I know it doesn't really make any difference.

* * * *

[5435] Order No. E-14664

OPINION AND ORDER DENYING AND DISMISSING PORTIONS OF PETITIONS FOR RECONSIDERATION

Remaining for disposition in this proceeding are those portions of the petitions for reconsideration and for other relief filed by Trans World Airlines, Inc. (Trans World), and United Air Lines, Inc. (United), requesting that the authorization of American Air lines, Inc. (American), to provide competitive nonstop service between New York and San Francisco be set aside on the grounds that American and the cities engaged in ex parte activities which resulted in violations of the Board's Principles of Practice and Rules of Practice.

The question whether and to what extent the allegations of violations of the Board's regulations justify further action in this proceeding and, if so, what action should be taken was deferred by the Board and set down for oral argument.[1] The Board has now heard oral argument and, after considering the contentions of the parties, concludes that the matters set forth in the petitions do not establish that further proceedings would be warranted or that the Board's award to American should be rescinded. However,

in view of the various problems of interpretation and application of our Principles of Practice which become apparent in this proceeding, we will undertake a prompt rulemaking reexamination looking toward modification and clarification of our regulations.

THE ISSUES

The issues with which we are here concerned arise from charges by Trans World and United that they were denied a fair hearing by reason of ex parte communications written or inspired by American, San Francisco, and Port of New York Authority, and by other efforts of these parties to bring pressure or influence to bear upon the Board.

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[1] Order E-14586, dated October 27, 1959.

Attached to the petitions for reconsideration are extensive selections from the Board's correspondence file, together with certain affidavits, designed to show that American and the cities engaged in an extensive pressure campaign throughout the course of the proceeding. The ex parte communications said to be shown by the attached letters are alleged to be in addition to public statements suggesting that pressure be exerted upon the Board, and to claimed improprieties committed by representatives of San Francisco at a meeting with the Board ostensibly restricted to a discussion of "general aviation problems in the City of San Francisco." There is no allegation of venality or corruption on the part of any party, staff member, Examiner, or Board Member.[2/]

[2/] The material affixed to the petitions is asserted to show (1) communications directly to the Board by the Mayor and other representatives of the City of San Francisco, (2) similar communications inspired by parties to the proceeding but written by nonparties, and (3) communications addressed to Members of Congress by San Francisco, Port of New York Authority and, through third persons, by American, seeking intervention and the exertion of influence in a manner other than that permitted by Rule 14 of the Board's Rules of Practice. The letters are said to show further, by their own incompleteness, (4) other contacts made in person (footnote continued on next page)

While the pleadings are sometimes couched in language calculated to suggest strong resemblance between this proceeding and certain cases which were fatally tainted by improper ex parte representations,[3/] essential dissimilarities are readily apparent and worthy of some emphasis. Absent here is any question of personal misconduct on the part of any Member in regard to his vote on the application. While the formal pleadings include within the scope of the requested hearings the subject of the qualification of Members, the petitioners have disavowed any accusation that any Member of the Board acted corruptly or with conscious bias, or would be disqualified from sitting in further judgment in this proceeding.[4] These

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2/ (footnote continued) or by telephone with Members of the Board or its staff, the extent and significance of which "can be no more than a matter of conjecture." By affidavits and offers of proof, petitioners claim ability to prove that certain ex parte letters to the Board from travel agents, sent directly or through a Member of Congress, were solicited by employees of American.

Petitioners claim that the alleged ex parte communications and efforts to solicit and inspire pressure resulted in violations of the Board's Principles of Practice and Rules of Practice, the legal effect of which is to necessitate vacation of Order E-14412 and a hearing de novo or, in the alternative, a reopening of the proceeding with a preliminary hearing to determine the facts as to ex parte activity and its effect upon the qualifications of the applicants and the Members of the Board.

3/ Sangamon Valley Television Corp. v. U.S., 358 U.S. 49 (1958); Id., C.A.D.C., No. 13,922, --F.2d-- (1959) (personal visits paid and gifts and letters sent to Commissioners by persons interested in allocation of TV channels by rulemaking); WIRL Television Corp. v. U.S., 358 U.S. 51 (1958) (private communications between a Senator owning stock in an applicant and Commissioners); WORZ, Inc. v. F.C.C., 358 U.S. 55 (1958); Id., C.A.D.C. 268 F.2d 889 (1959) (ex parte representations made to Commissioner regarding qualifications of applicant); WKAT, Inc. v. F.C.C., C.A.D.C., 258 F.2d 418 (1958) (personal visits and gifts to Commissioner calculated to influence his decision by pressure); Massachusetts Bay Telecasters, Inc. v. F.C.C., C.A.D.C., 261 F.2d 55 (1958) (private conferences between representatives of applicants and a Commissioner after close of evidentiary hearing). The last two cases, popularly known as the Channel 10, Miami, and Channel 5, Boston, cases, respectively, have been the subject of Initial Decisions on remand in which disqualifying conduct was found in connection with the first, but not the second, proceeding.

[4] See, e.g., statements of counsel for Trans World and United, Transcript of Oral Argument of November 12, 1959, pages 15, 21, and 34.

concessions leave only the bare assertion, which we reject, that the alleged campaign might possibly have had some effect upon the judgment of a Member in his decision.

Similarly, this case does not contain any allegation of wrongdoing on the part of the third persons, including Members of Congress and other governmental officials, who wrote to the Board expressing their interest in and concern with this proceeding.[5] Petitioners' criticism is directed, not at these persons, but rather at those parties to this case who are alleged to have inspired or solicited such communications as part of a concerted attempt to bring pressure or influence to bear upon the Board.

Although the conduct of American and the cities is said to go beyond that permissible under our Principles of Practice, no genuine complaint is made that these parties were attempting to corrupt any Member of the Board or its staff, or that it was improper for them to attempt to interest Members of Congress in taking a position with respect to this proceeding in the manner permitted by the Board's rules.[6]

The most important distinction between this proceeding and the cited cases, however, lies in the nature of the communications which are branded as ex parte. Whereas the offending communications in the latter proceedings were clandestine and unknown to the parties for purposes of rebuttal, the letters complained of here were in no sense covert and neither requested

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[5] See, e.g., statement of counsel for United, Transcript of Oral Argument of November 12, 1959, page 25.

[6] See, e.g., statement of counsel for United, Transcript of Oral Argument of November 12, 1959, pages 21 and 22.

nor were given confidential treatment by the Board.[7] In accordance with long-established Board practice, each communication received, together with a copy of the Chairman's routine acknowledgement, was placed in the Board's public correspondence file of this case. By this procedure the Board made the letters public documents which were available for inspection at all times in the Board's Docket Section.[8]

In this setting, the allegations in the petitions herein present questions not as to covert conduct, but questions as to whether the overt conduct of American and the cities in supporting the request for service transgressed the Board's Principles of Practice, whether the receipt of letters and the conference with representative of San Francisco violated the Rules of Practice, and, if so, what remedy is appropriate in the circumstances of this case.

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[7] We find that, for purposes of determining this matter, we should concentrate upon the letters from the Board's public correspondence file selected by petitioners, and disregard as immaterial two telephone calls or informal contacts referred to in the letters, and enclosures returned by the Board to the senders. The calls noted appear to be routine requests for information connected with the letters which followed and, in the absence of any allegation concerning their nature, cannot be deemed to have any independent significance. The material enclosed in the correspondence which was returned would not appear to add anything of material value to the available letters of transmittal.

[8] Communications concerning pending cases, which are commonplace and well known to the experienced practitioners representing petitioners, are thus publicized by the Board for the salutary purposes of apprising the parties of the representations contained therein and of precluding any improper approaches which could not withstand full disclosure. This treatment by the Board of the letters involved in this and other cases has been made known to Congress, accords with proposals presently before the Congress for correction of ex parte problems, and appears to be proper in all respects. See H.R. 4800, 86th Cong., 1st Sess. (1959).

THE PRINCIPLES OF PRACTICE

The pertinent regulation here is Rule 2 of the Board's Principles of Practice, relating to improper influence in cases to be determined after notice and hearing and upon a record.[9] Rule 2(a) makes improper any "private" communication on "the merits" of a case to the Board by any person unless provided for by law. Rule 2(c) proscribes, among other things, any effort by an interested person to sway the judgment of the Board "by attempting to bring pressure or influence to bear upon the Members of the Board or its staff."

These rules, with others, were promulgated in 1951 to "serve as a guide for all parties and the Board and its staff in relation to proceedings before the Board."[10] Unfortunately, as this case illustrates, uncertainties surrounding the regulation have limited its clarity and usefulness as a guide.

A major weakness in the Rule arises from the absence of a precisely defined boundary between improper "attempts to bring pressure or influence to bear" and the legitimate cultivation of municipal and congressional

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9/ "Par. 300.2. Hearing Cases - Improper Influence. It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases --

"(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

* * * *

"(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case."

10/ PR-10, effective March 30, 1951, setting forth a new Part 300 to the Board's Procedural Regulations.

support which is contemplated by both our statute and our regulations. On the one hand, we must recognize that the statutory encouragement of public views[11] makes necessary special latitude for the presentation of positions of public officials representing geographical segments of the traveling public. The unique place in our statutory scheme of cities and states and their congressional representatives, who are not truly adversary interests in any proceeding, is implicit in the provisions of our Rule 14[12] and the concomitant view of both the Board and the courts that nothing improper attaches to the attempts of parties to enlist active support from interested civic and congressional officials within the framework of our rules. Indeed, when this latter point was recently questioned before a reviewing court, no merit was found in the claim that congressional participation in oral argument under Rule 14 in favor of a carrier constituted improper influence, irrespective of whether the carrier actively

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[11] See, e.g., Section 401(g) of the Federal Aviation Act, which provides that:

> "The Board upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, ***. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate."

[12] "Participation in hearings by persons not parties. Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned."

solicited such participation.[13]

At the opposite extreme, we deem it uncontrovertible that the Rule forbids a persistent and repeated pattern of conduct designed to influence the Board by a constant flood of correspondence which neither is nor could be submitted through the channels of the Board's regulations. Left unclear by the Rule, however, is the point at which impropriety creeps into efforts to secure support--support which could have been expressed within the rules by a statement for the hearings or for oral argument, but which takes the form of letters to the Board, made public by the Board.

Similarly unresolved by the express language of the Rule, which is limited to "cases to be determined after notice and hearing and upon a record," is the question whether its prohibitions apply to proceedings requesting institution of an evidentiary hearing on a route application. This point is of peculiar importance, where, as here, approximately eighty percent of the communications preceded the order setting the application down for hearing.[14] Despite the contentions to the contrary, we read Rule 2 to be applicable to the proceedings relating to advancement of American's application on the docket. It is evident, however, that the ambiguity of the Rule may have

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[13] *Eastern Air Lines, Inc., v. Civil Aeronautics Board*, C.A. 2 No. 25,422 et al., --F.2d-- (October 7, 1959).

[14] The parties dispute, among other things, the significance of *Sangamon Valley Television Corp. v. U.S.*, C.A.D.C., No. 13,992, --F.2d-- (1959), involving the shifting of UHF and VHF television channels between communities by rule-making methods as opposed to action on the basis of an evidentiary record. American contends that the outcome of the rulemaking involved in *Sangamon*, unlike the setting of its application for evidentiary hearing, would have had as great an economic impact on the parties as would the outcome of an adjudicatory proceeding; in contrast, the order initiating this case allegedly did not enhance or injure any party's position on the merits. Trans World, however, finds the cases analogous in that both the rulemaking proceeding and the determination of the motion to expedite are deemed *sine qua non* of the eventual grant.

Petitioners also say that Rule 1 of the Rules of Practice in Economic Proceedings specifies that a proceeding is instituted "by the filing with the Board of an application, complaint or petition," and that it follows that the filing of an application which ultimately must be disposed of on a record marks the institution of that proceeding for purposes of the Principles. This argument, however, overlooks the fact that Rule 11(b)(3) defines a "pending proceeding" for purposes of practice by persons formerly employed by the Board, an action which would have been unnecessary if Rule 1 were determinative of the institution date of a proceeding for all purposes.

resulted in doubt as to the standard of conduct required prior to the institution of the evidentiary hearing. In these circumstances, we will reexamine this question through the medium of a rulemaking proceeding for modification and clarification of Rule 2.

Among other problems which exist with respect to the Rule is the question whether communications are "private" even when no confidential treatment is requested and they are made public as a matter of course in the Board's correspondence file. There is also a question whether communications are "on the merits" even though, as do many letters in this proceeding, they relate to matters of procedure or routinely transmit material without comment. The existence of such areas of uncertainty makes necessary a revisionary rulemaking proceeding which we plan to undertake, and tends to mitigate the seriousness of conduct found to be at odds with the purpose of the Rule.

It is against the background of this Rule, with its attendant problems, that we must assess the claimed conduct of the parties. We proceed upon the charges fairly alleged and base our decision upon the nature, rather than the number, of the activities specified, in view of the position of petitioners that further investigation would do no more than provide proof

of the allegations or show matters entirely cumulative in nature.[15/]

The Port of New York Authority

We find that, with regard to the Port Authority of New York, the charges may be regarded as either withdrawn or conclusively rebutted. The accusation made by the petitions was that the Port Authority enlisted the support of various Members of Congress by providing them with copies of its submissions in the proceeding in support of a third New York-San Francisco nonstop carrier. The allegation was based upon inferences drawn from five letters in 1957 and one letter in 1959 from Members of Congress which generally referred to a letter from the Port Authority and supported the Port Authority's position. In its responsive motion to strike portions of the petitions concerning it, however, the Port Authority submitted a sworn affidavit that it had provided no information concerning its position to any Senator or Congressman except a reply made pursuant to a direct Congressional request in 1959. United does not controvert the truth of the affidavit, and Trans World has advised the Board that its allegations with respect to the Port Authority should be withdrawn. With the pleadings in this posture, we find that the conduct of the Port Authority is affirmatively shown to be beyond reproach, and that charges against the Port Authority should be dismissed.

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[15] See statements of counsel for Trans World and United, Transcript of Oral Argument of November 12, 1959, pages 13 and 27, respectively.

The City and County of San Francisco

The allegations concerning the City and County of San Francisco present a more troublesome problem. Briefly, it is said that San Francisco violated the Principles of Practice by sending private communications directly to the Board, by inspiring ex parte communications on the part of Members of Congress and others, and by making direct representations concerning this proceeding at a conference with the Board ostensibly restricted to general aviation problems of the city.

The showing made in support of the petitions, in our judgment, indicates a strong likelihood that San Francisco, motivated by an excess of zeal and a lack of understanding of the precise bounds of our procedures, may have violated Rule 2. We need not decide the point, however, for we have concluded that the violations, if proved, would not justify removal of the competitive nonstop service authorized in this proceeding.[16] Our view is based upon consideration of the technical nature of the alleged misconduct, the opportunity under our rules to make similar representations in an entirely proper fashion, and the unreasonableness of penalizing New York and American for San Francisco conduct.

The most questionable practice relates to material sent to the Board by the Mayor of San Francisco and by civic groups. Included in these communications are representations concerning the need for additional service, supported by numerous newspaper clippings and resolutions of civic bodies. While

we think it unfortunate that San Francisco supplemented its filings on the record by these informal communications, we are aware that the transmittals contain nothing which could not have been brought to the Board's attention through the filing of a motion to expedite the proceeding. The core of the complaint against these communications lies not in any claim that the material submitted was itself improper, but that by means of the informal character of the submission San Francisco failed to serve copies upon Trans World and United. Although this omission is undesirable, we think that, in the light of the availability of the documents for public inspection, the communications do not pose those problems of fair play and due process which might vitiate the proceeding.

Also of concern is the allegation that the Mayor of San Francisco, a member of his Committee for Shipping, and the Public Utilities Commission actively inspired Members of Congress and others to communicate with the Board. The charge is based upon a number of communications, for the most part dated before the institution of the hearing, which refer to or enclose correspondence from these sources,

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16/ Although the Principles of Practice provide for withdrawal of the privilege of practicing before the Board, we do not understand the petitions to suggest, nor any showing to support, the conclusion that any attorney practitioner authorized or was aware of unethical or improper professional conduct.

and upon other communications from California public and civic figures bearing no apparent reference to incitement by San Francisco. In relation to these matters, it must be recognized that, as noted earlier,[17] no complaint can be made against solicitation of support from Congressmen, Mayors, or Governors which is to be expressed

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[17] See *supra*, pages 6-8.

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within the framework of the Board's regulations.[18] Even acknowledging this point, however, it appears that San Francisco actually requested expressions of position outside the regulatory scheme. We further note that the Board has already had occasion to rebuke officials of San Francisco for a public statement relating to placing "pressure" on the Board,[19] and we think it particularly unfortunate that San Francisco's activities off the record only diminished rather than ceased after our warning. Yet, even conceding that officials of the city overstepped the bounds of Rule 2, not all the communications received from California sources and attributed to San Francisco by petitioners may be deemed part of an improper pressure campaign. Thus, many of the letters from elected officials are labeled statements under Rule 14 in lieu of oral argument, and although the Rule makes no provision for written rather than oral presentations, cannot seriously be said to go substantially beyond the bounds of permitted practice.[20] And, as to letters from California public and civic figures which do not clearly indicate San Francisco inspiration, we think that recognition of the propensity of public officials to support spontaneously requests for additional air service for constituents mitigates against any light assumption of

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[18] It may well be that, in certain circumstances, even solicitation of support within the rules, if done in wholesale terms, would violate Rule 2.

[19] See Transcript of Conference -- The City and County of San Francisco, California, December 2, 1957, pages 3 through 6.

20/ It is customary, as was the case here, that such written submissions under Rule 14 are announced and included in the record by the Chairman at Oral Argument without objection from any party. See Transcript of Oral Argument of April 29, 1959, page 2. We understand United to concede the propriety of submitting a written statement in lieu of appearance at oral argument. See statement of counsel for United, Transcript of Oral Argument of November 12, 1959, page 22.

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motivation by the city, although the existence of such solicitation would not change our opinion. In sum, we conclude that, if the allegations in the petitions are true, San Francisco erred in seeking expressions of support beyond that contemplated by our rules. We need not, however, test the proof of the allegations of excess solicitation for, as we note herein, such an abuse warrants discouragement but not the deprivation of the authorized air service.

Less clearly indicated is the charge that representatives of San Francisco abused a conference with the Board on general aviation problems of the city by making an ex parte plea on the merits of this case. Such a presentation was initially ruled out by the Chairman[21/] and, although the need for additional transcontinental service was advocated, was further curtailed when a Board Member took exception to an attempt to elaborate upon the filed pleadings.[22/] While the references to New York-San Francisco service are understandably objectionable to Trans World and United, we think that any resulting prejudice was cured by the immediate publication of the transcript and the six-week interval between the Conference and our order, during which the parties were free to rebut San Francisco's remarks by the filing of appropriate papers.

To summarize our review of the allegations concerning San Francisco, we have concluded that, if the well-pleaded accusations are assumed to be

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21/ Transcript of Conference -- The City and County of San (cont'd.)

(continued) Francisco, California, December 2, 1957, pages 2-3.

22/ Ibid., page 12.

true, some of the conduct revealed would fail to square with a strict interpretation of our regulations. While such deviation from Rule 2 is to be strongly discouraged, we cannot find that it is so egregious as to require a sanction which would deprive the Bay Area of air service found needed upon a full evidentiary record. But even if such a sanction would otherwise be reasonable, we think that there is no warrant for denying by the same stroke the air service needs of the even more numerous constituents of the New York-New Jersey area, who are without fault, or for rescinding the valuable route franchise granted to American.

American

We turn now to the question whether American by its conduct subverted the process of adjudication upon its application; and, if so, whether American should be disqualified as an applicant, or should be adversely affected in terms of comparative fitness with Northwest. We find that the allegations concerning American are clearly insufficient to warrant further inquiry as to its conduct, and that the allegations of petitioners do not demonstrate activities by American which should vitiate our award.

The accusations against American are that it improperly inspired communications by Members of Congress, and by travel agents directly or through Members of Congress, and that it must share the responsibility for the ex parte communications generated by San Francisco.

The allegation that the activities of San Francisco should be imputed to American rests upon the fact that, in November 1957, the

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carrier's president appeared in the city and urged civic leaders to "keep hammering" for the desired expedition of additional air service. While there has been no denial that these words were indeed used, we think they fall far short of any showing that American sought more than vigorous participation within the confines of the rules by a party to the proceeding who had already allied itself on the record with American's proposal for an expedited hearing. To infer from that language a request for improper conduct strains credulity. We cannot conclude that petitioners' coupling of the remarks of American's president with activities of San Francisco, which had begun six months before, raises any question reflecting unfavorably upon American or warranting further inquiry.

We find no greater merit in the contention that American solicited communications from Members of Congress which were not submitted pursuant to Rule 14. The allegation is based upon three letters which indicate access to American's pleadings, and upon the fact that some letters refer to American specifically while the competing applicant is unmentioned. Even assuming that, as indicated by the letters, one Member of Congress received a copy of American's motion and two others knew its substance, it does not follow that the carrier was the source of supply or, even if it were, that the material was transmitted with any intent to inspire the communications which ultimately resulted. Similarly unimpressive is the attempt to read significance

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into the absence in congressional letters of any mention of Northwest, for many of the documents claimed to refer solely to American's proposal in fact make no mention of that carrier, generally support the Initial Decision in which American was selected, or transmit, generally without comment or with disclaimers of interest, communications from constituents who express interest in or support of American's application. Of the same general character is the non sequitor, introduced at oral argument, that the denial of activity by the Port Authority means that American must have acquainted the Congressmen with the views of the Port Authority. In sum, we do not view the allegations of solicitation of Congressional support off the record as properly buttressed by any matter or as casting any well-pledged aspersion on American justifying further investigation.

The allegations concerning solicitation of letters from travel agents by employees of American, however, does indicate some violation of the Rule, although not of a character either vitiating the proceeding or affecting that carrier's comparative qualifications. Trans World has offered to prove that nine letters or wires from travel agents received by the Board either directly or through Members of Congress were so solicited, and United has filed six affidavits and one letter corroborating the allegation. Assuming the truth of the averments, we view the three requested letters sent directly to the Board[23] as violations, for solicitation of communications otherwise than in accordance with the Board's rules is prohibited. We think that the solicitation of a telegram to a Congressman in 1957 may also have been questionable, in that no oral argument or hearing was in the offing. Solicitation of the remaining communications to Members of Congress made in 1959 would not, however, be improper, for American, having the right to enlist Congressional support at oral argument, could legitimately seek to persuade interested travel agents that they should attempt to gain the

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[23] One such letter, from an R. John Charles, Jr., is not attached to the petitions, but its existence is alleged by Trans World, and a United affidavit indicates that the letter was sent "to persons in official government capacity in Washington, D.C. ***" Another letter, from Andrews Travel Agency, which petitioners say they could not locate, was publicly placed in Docket 5903.

intervention of their elected representatives under the procedures of Rule 14. But apart from procedural niceties, we do not think that these activities rise to the level of a deliberate campaign of pressure which would adversely affect the award to American. The activities in this regard appear to be on the part of lower echelon representatives of the carrier who, out of misplaced loyalty, may be expected to attempt to assist their employer's cause by spontaneous suggestions which sometimes slight unknown niceties of practice before the Board. There is no indication here that the employees' actions were the result of a policy formulated by their superiors, or that such conduct was part of a general pattern which would evidence a company attempt to flaunt our rules. Indeed, while our decision does not turn upon the extent of the activity specified, it is only reasonable to assume that the existence of a concerted attempt by American to flood the Board with letters from travel agents during the twenty-eight month course of this proceeding would have produced more than the handful of communications noted here. We realize, of course, that carriers are legally responsible for the acts of their employees and will expect that carriers undertake appropriate procedures for controlling such activities. Nonetheless, in the present case, the indicated employee solicitation is so minimal as to be of no material consequence.

In summary, we do not think that the relatively minor violation by employees of American with regard to several travel agents, which is the total misconduct fairly imputed by the allegations, can in any meaningful way be said to require reconsideration of the carrier's comparative qualifications for the nonstop authority awarded in this case. Whatever blame might be justified by the technical violations, mitigated to some extent by the absence of a more stringent and clear Rule of ethical practice, weighs lightly on any scale which takes account of American's unblemished record of years of practice and service in strict accordance with the Board's rules and regulations.

THE RULES OF PRACTICE

Posed by the petitions is the question whether the receipt of various communications and the holding of the conference with representatives of San Francisco constituted violations of Rules 18 and 24(j) of the Board's Rules of Practice. Although we are aware of the undesirability of informal approaches touching upon contested matters to be decided on the basis of formal filings on a record,[24] we do not find the actions involved here so troublesome with regard to rules of fair play as to vitiate the proceeding.

The acceptance by the Board of informal communications supporting the

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motion and application is said to contravene Rule 18(c),[25] insofar as such letters were received after the cut-off date for answers to the motion, and Rule 24(j),[26] precluding acceptance of nonstipulated matter after the close of the hearing. But the Rules of Practice are intended to relate to formal documents submitted for the record, and have not been applied to the public communications which are not treated as having, and have, no status on the record. The letters are expressions of views by third parties to the Board, common in similar cases, and the Board, aware of its inability to isolate itself from the public, has regularly directed its staff to prepare routine acknowledgments and place the correspondence in the public file maintained in the Docket Section. These communications are rarely even brought to the attention of any Board Member, save for signature on the acknowledgment, and form no part of the pleadings, evidence, or arguments considered by the Board in disposing of the case.[27] While it might be possible, if impractical, to return such communications to the senders, we note that our present procedure is mirrored in pending

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[24] Cf. *Sangamon Valley Television Corp. v. U.S.*, C.A.D.C., No. 13,922 -- F.2d -- (1959).

25/ Rule 18(c) provides: "Answers to motions. Within seven (7) days after a motion is filed, or such other period as the Board or Examiner may fix, any party to the proceeding may file an answer in support of or in opposition to the motion, accompanied by such affidavits or other evidence as it desires to rely upon."

26/ Rule 24(j) provides: "Receipt of documents after hearing. No document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the Examiner."

27/ Among the communications complained of are statements of Congressmen submitted under Rule 14 in lieu of oral argument and, although written rather than oral presentations are not specified by that Rule, inclusion of several such communications in the transcript of oral argument was announced by the Chairman with no objection from petitioners. Transcript of Oral Argument of April 29,1959, page 2. Statements in certain staff prepared acknowledgments of other letters that the letters would be given careful consideration or would be incorporated in the formal record were both inadvertent and contrary to fact.

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legislation designed to cope with this problem.28/ Nevertheless, we will explore the question further in rulemaking proceedings.

The claim that the holding of a conference with representatives of the City and County of San Francisco constituted oral argument unauthorized by Rule 18(d)29/ is in our view without merit. Petitioners' premise that the conference was a part of this proceeding is faulty, and does violence to the Chairman's direction that the meeting was restricted to general aviation problems in the City of San Francisco without discussion of any specific application which might be pending.30/ Although difficulties may arise in exploring civic problems of air service which may in part parallel pending applications, the Board cannot consistently with its duties under the Act quarantine one of the major civic users of air transportation on the grounds that it is formally engaged in a proceeding designed to satisfy its needs in one market. While we do not believe that San Francisco converted the conference into a violation of Rule 18 by referring to its transcontinental

needs, we expect to reexamine our informal procedures to obviate the unfortunate appearances which underlie petitioners' objections. As we noted in our earlier discussion of the conference,[31] however, the particular circumstances present here did not create any basic unfairness to petitioners.

Our discussion we think conclusively demonstrates that, although the events of this case are troublesome, the activities of the parties and the receipt of the communications do not constitute the alleged gross violations of our regulations which are claimed to have deprived petitioners of a fair hearing or to vitiate the proceeding.

CONCLUSION

A careful review of the charges, with all fairly pleaded allegations construed in favor of petitioners, has failed to reveal any matter which would warrant vitiation of the proceeding, reassessment of American's comparative qualifications, or further investigation. Although our decision is based upon a consideration of the dual public interest in the integrity of the administrative process and in the increased air service here authorized, the reasonableness of our conclusion is weighted by the tardy manner in which the charges were made. The great bulk of the communications reflecting the pattern of conduct to which objection is made were included in the Board's

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[28] See page 5, *supra*, at note 8.

[29] Rule 18(d) provides: "*Oral arguments; briefs.* No oral argument will be heard on motions unless the Board or the Examiner otherwise directs. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the position taken."

[30] See transcript of Conference--The City and County of San Francisco, California, December 2, 1957, pages 2-3.

public correspondence file prior to the institution of an evidentiary hearing and, had these allegations been heard at that date, any supposed prejudice could have been cured by

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31/ See page 14, supra.

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appropriate Board admonition before the fresh start afforded by the beginning of the evidentiary hearing. We find petitioners' claim of surprise and late discovery of the letters unpersuasive in view of the commonplace occurrence of similar correspondence barrages in like cases and of the publicized rebuke administered to representatives of San Francisco at the 1957 conference, and we can only conclude that petitioners hoarded their grievances until after the decision on the merits. We think that the unreasonable delay is a factor to be considered in deciding, on reconsideration, whether to deprive the general public of the needed service.[32]

Despite the absence of any fair allegation which would adversely affect the award to American as a matter of law, however, we would take further action if the nature of the alleged pressure, consisting mainly of communications from public officials, posed any threat; real or apparent, to the impartiality of our deliberative process. Such is not the case, for the letters are merely corroborative of the Board's normal assumption in any route case that all public officials and civic bodies will favor new or additional air service. Our treatment of the letters, we think, reflects their proper place in the proceeding. The mere existence of the communications in the public correspondence file does not suggest, and did not mean in this case, that the Board deviates from its statutory obligation to decide exclusively on the basis of the formal record compiled after notice and hearing.

32/ See Rule 37(b) of the Board's Rules of Practice.

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This examination of the portions of the petitions deferred by the Board has proceeded pursuant to the authorization of the Court of Appeals in which Petitions for Review are pending. In light of the conclusions reached herein, we find that the deferred portions of the petitions should be dismissed or denied[33] and that the defeasance clause in American's certificate should be stricken. The latter action is subject to any approval that the Court of Appeals deems necessary or appropriate and for this reason we are delaying the effective date of the certificate.

ACCORDINGLY, IT IS ORDERED:

1.. That an amended certificate of public convenience and necessity in the form attached hereto be issued to American Airlines, Inc., for Route 4; that said amended certificate shall be signed on behalf of the Board by the Chairman, shall have affixed thereto the seal of the Board attested by the Secretary, and shall be effective sixty days from the date of service of this order.

2. That the portions of the petitions for rehearing, reargument, and reconsideration, heretofore deferred by Order E-14586, dated October 27, 1959, be and hereby are dismissed insofar as they request

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[33] Our denial of United's petition includes a denial of its request, contained therein, that documents from the public correspondence file be made part of the formal record.

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relief predicated upon alleged improper activities by The Port of New York Authority; and

3. That the remaining portions of said petitions be and hereby are denied.

Gurney, Vice Chairman, and Minetti, Member of the Board, concurred in the above opinion and order. Durfee, Chairman, filed the attached concurrence and dissent. Gillilland and Boyd, Members, did not take part in the decision.

/s/ Mabel McCart
Acting Secretary

(SEAL)

[5460]

DURFEE, CHAIRMAN, CONCURRING AND DISSENTING:

I concur with the Board's decision in all but one important aspect: I would direct further inquiry into the allegations concerning American Airlines before making a final disposition of this case.

While I do not believe that the allegations of TWA and United as to American unequivocally establish serious violations of the Board's Rules or Principles of Practice, there is sufficient evidence of conduct that was, at best, marginal, to justify and, indeed, require further inquiry by the Board. The Board has stated no good reason for not directing such an inquiry; and the integrity of our process is too important for this matter to be so summarily dismissed. I shall amplify my views of this matter in greater detail at a later date.

/s/ JAMES R. DURFEE

[5461]

Issued pursuant to
Order No. E-14664

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended)

for Route 4

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AMERICAN AIRLINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the terminal point Los Angeles, Calif., the intermediate points San Diego, Calif., Phoenix, Tucson, and Douglas, Ariz., El Paso, Tex., and beyond El Paso, Tex., the intermediate points (a) Oklahoma City and Tulsa, Okla., and Nashville, Tenn., or (b) Midland-Odessa (to be served through Midland Army Air Field), Big Spring, Abilene, Fort Worth, and Dallas, Tex., Texarkana and Little Rock, Ark., Memphis and Nashville, Tenn., and

(a) beyond Nashville, Tenn., the intermediate points Louisville, Ky., and Cincinnati, Ohio, and (i) beyond Cincinnati, Ohio, the intermediate points Dayton, Columbus, and Akron, Ohio, and the terminal point Cleveland, Ohio, and (ii) beyond Cincinnati, Ohio, the intermediate points Columbus, Ohio, Pittsburgh, Pa., and the coterminal points New York, N. Y., and Newark, N. J.,

(b) beyond Nashville, Tenn., the intermediate points Louisville, Ky., Cincinnati, Ohio, Huntington, Charleston-Dunbar, Parkersburg, Clarksburg, and Elkins, W. Va., Washington, D. C., Baltimore, Md., Wilmington, Del., Philadelphia, Pa., Newark, N. J., New York, N. Y., Bridgeport, New Haven, and Hartford, Conn.-Springfield, Mass., Providence, R. I., and the terminal point Boston, Mass.,

(c) beyond Nashville, Tenn., the intermediate points Knoxville, Tenn., Bristol, Roanoke, Lynchburg, and Richmond, Va.,

Washington, D. C., Baltimore, Md., Wilmington, Del., Philadelphia, Pa., Newark, N. J., New York, N. Y., Bridgeport, New Haven, and Hartford, Conn.-Springfield, Mass., Providence, R. I., and the terminal point Boston, Mass.;

2. Between the coterminal points San Francisco and Oakland, Calif., the intermediate points Phoenix, Tucson, and Douglas, Ariz.,

El Paso, Tex., and beyond El Paso, Tex., the intermediate points (a) Oklahoma City and Tulsa, Okla., and Nashville, Tenn., or (b) Midland-Odessa (to be served through Midland Army Air Field), Big Spring, Abilene, Fort Worth, and Dallas, Tex., Texarkana and Little Rock, Ark., Memphis and Nashville, Tenn., and beyond Nashville, Tenn., as described in "1" (a), (b), and (c) above;

3. Between the terminal point Milwaukee, Wis., the intermediate points Chicago, Peoria, and Springfield, Ill., St. Louis, Springfield, and Joplin, Mo., Tulsa and Oklahoma City, Okla., Dallas, Fort Worth, Abilene, Big Spring, Midland-Odessa (to be served through Midland Army Air Field), and El Paso, Tex., Douglas, Tucson, and Phoenix, Ariz., and (a) beyond Phoenix, Ariz., the intermediate point San Diego, Calif., and the terminal point Los Angeles, Calif., and (b) beyond Phoenix, Ariz., the coterminal points Oakland and San Francisco, Calif.;

4. Between the terminal point Houston, Tex., the intermediate points Nashville, Tenn., Columbus, Ohio, and Pittsburgh, Pa., and the coterminal points New York, N.Y., and Newark, N.J.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate; and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points prior to the effective date of this certificate. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in

addition to the service hereinabove expressly prescribed, regularly serve a point named herein, other than a point required to be served through an airport named herein, through any airport convenient thereto, and

render scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby.

(3) The holder shall serve Milwaukee, Wis., only on flights originating or terminating at St. Louis, Mo., or a point west thereof.

(4) The holder shall serve San Diego, Calif., only on flights originating or terminating at Phoenix, Ariz., or a point east thereof.

(5) Except with respect to nonstop flights scheduled between San Francisco or Oakland, Calif., on the one hand, and New York, N. Y., or Newark, N. J., on the other hand, the holder shall serve San Francisco and Oakland, Calif., only on flights serving Dallas, Tex., Tulsa, Okla., or a point west of either thereof other than San Francisco or Oakland, Calif.

(6) The holder shall not render nonstop service (a) between Cincinnati, Ohio, and Philadelphia, Pa., and (b) between Charleston, W. Va., and Philadelphia, Pa., Newark, N. J., or New York, N.Y., and (c) between New York, N. Y., Newark, N. J., or Philadelphia, Pa., on the one hand, and Clarksburg, Elkins, Parkersburg, or Huntington, W. Va., on the other hand.

(7) Flights serving Dayton or Columbus, Ohio, on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve Nashville, Tenn.

(8) Flights serving Louisville, Ky., on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve (a) Nashville or Memphis, Tenn., or Dallas, Tex., or (b) Tulsa or Oklahoma City, Okla., and at least one additional intermediate point west of Tulsa.

(9) Flights serving Cincinnati, Ohio, on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve (a) Nashville or Memphis, Tenn., Dallas, Tex., or Chicago, Ill., or (b) Tulsa or Oklahoma City, Okla., and at least one additional intermediate point west of Tulsa.

(10) Flights serving Louisville, Ky., on the one hand, and Huntington and Charleston, W. Va., Washington, D. C., Baltimore, Md., or Wilmington, Del., on the other hand, shall also serve Cincinnati, Ohio.

(11) Flights serving Louisville, Ky., on the one hand, and Philadelphia, Pa., on the other hand, shall serve Cincinnati, Ohio, and one intermediate point between Cincinnati, Ohio, and Philadelphia, Pa.

(12) Flights serving Louisville, Ky., on the one hand, and New Haven and Hartford, Conn.-Springfield, Mass., Providence, R. I., and Boston, Mass., on the other hand, shall also serve both Cincinnati, Ohio, and one of the following points: Washington, D.C., Baltimore, Md., Wilmington, Del., Newark, N.J., or New York, N.Y.

(13) Flights serving Charleston, W. Va., on the one hand, and New Haven, Conn., Hartford, Conn.-Springfield, Mass., Providence, R. I., or Boston, Mass., on the other hand, shall also serve one of the following points: Washington, D. C., Baltimore, Md., Wilmington, Del., Newark, N. J., or New York, N. Y.

(14) Flights serving Nashville, Tenn., on the one hand, and Charleston or Huntington, W. Va., on the other hand, shall also serve Cincinnati, Ohio.

(15) Notwithstanding the linear route description in this certificate, the holder may serve the coterminal points San Francisco and/or Oakland, Calif., on the one hand, and Phoenix, Ariz., and points east thereof, on the other hand, on flights carrying property and mail only,

which also serve the intermediate points Los Angeles and/or San Diego, Calif.: Provided, That on such flights the holder shall not discharge at Los Angeles or San Diego property or mail which was enplaned in San Francisco or Oakland and shall not discharge at San Francisco or Oakland property or mail which was enplaned in San Diego or Los Angeles.

(16) The holder's authority to serve Huntington, W. Va., is suspended.

(17) The holder's authority to serve Texarkana, Ark., is suspended for the period during which Trans-Texas Airways is authorized to serve such point.

(18) Flights serving Houston, Tex., shall also serve Pittsburgh, Pa.

(19) Flights serving Pittsburgh, Pa., shall (a) also serve at least one of the following points: Memphis and Nashville, Tenn., Tulsa and Oklahoma City, Okla., Fort Worth, Dallas, and Houston, Tex., and (b) originate or terminate at (i) Tulsa, Okla., or Dallas, Tex., or a point west of either such point, or (ii) Houston, Tex.

(20) Flights serving Columbus, Ohio, on the one hand, and New York, N. Y., or Newark, N. J., on the other hand, shall also serve at least one of the following points: Memphis and Nashville, Tenn., Tulsa and Oklahoma City, Okla., Fort Worth, Dallas, and Houston, Tex.

The exercise of the privileges granted by this certificate shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

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The authority in "(15)" above shall expire on August 11, 1954, or upon the date the temporary certificates of public convenience and necessity issued pursuant to the Board's Order E-3085, dated

July 29, 1949, otherwise cease to be effective, whichever shall first occur.[1]

This certificate shall be effective on January 18, 1960.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman, and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on the 19th day of November, 1959.

/s/ James R. Durfee
Chairman

(SEAL)

ATTEST:

/s/ Mabel McCart
Acting Secretary

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[1] American Airlines, Inc., has filed an application on February 8, 1954, Docket 6541, for continuation of the authority in "(15)" above.

[5466]

Room 5042, Commerce Building
Washington, D. C.
Monday, December 2, 1957

The above-entitled matter came on for conference, pursuant to notice, at 11:35 o'clock a.m.

PRESENT:

JAMES R. DURFEE, Chairman,
CHAN GURNEY, Vice Chairman,
G. JOSEPH MINETTI, Member,
LOUIS J. HECTOR, Member.

ALSO PRESENT:

JOSEPH MARTIN,
Chairman, Public Utilities Commission, City and County of San Francisco.

ALBERT E. SCHLESINGER, Vice-President, San Francisco Downtown Association.

C.A.B. STAFF:

MERVIN F. BAGAN, Assistant to Member Denny;
ROBERT C. LESTER, Assistant Legal Adviser to Chairman Durfee;
IRVING ROTH, Associate Director, B.A.O.;
JOHN W. DREGGE, Chief, Routes Division;
E. BRUCE MILLER, Chief, Trunkline Section;
WILLIAM KLOEPFER, JR., Chief, Office of Information.

[5467]

PROCEEDINGS

Chairman Durfee: It is the established policy of the Board on informal presentations such as this by municipalities as to their general needs for improved or more adequate air transport to exclude the specific air carriers that may be involved. However, a transcript of the remarks being made here is being prepared and will be available for anyone who wants it.

The Board also wishes to note the presence of appropriate members of the staff who perhaps may also have some questions to ask.

I would like to emphasize that in such meetings as this, which has been called at the request of the City of San Francisco and upon recommendation of representatives of the State of California in both the Congress and the Senate, the Board is here to discuss your general aviation problems in the City of San Francisco. I would also like to emphasize that the Board cannot, on an ex parte basis such as here exists, particularly in the absence of the carriers — the competitive carriers who may be affected — discuss any specific applications which may be pending. As you know, the Board has before it the question whether an expedited hearing should be held on applications for San Francisco-New York nonstop service. Our staff is currently preparing a report on this matter which is expected to be submitted to the Board in the very near future. I don't believe it is the intention of the Board to hear any

specific discussion of this specific case or any other specific case.

In that connection, gentlemen, the Board feels compelled to call to your attention a publication — I am quoting from the Aviation Daily of December 2, 1957, which purports to quote an article from the San Francisco Examiner:

"The Examiner said 'Both Cleary and Martin would go to Washington to see if they can persuade the C.A.B. to give the matter an immediate hearing. As Martin explained the matter to the committee, Cleary would drum up support from California legislators and office-holders who in turn would pressure the C.A.B. Martin would talk to the C.A.B. Members. Martin said the C.A.B. would move on the matter "only if they are convinced that the people of San Francisco are really interested." Being "really" interested means more than just saying so in letters and telegrams, said Martin." The story continued "— I assume referring to the story in the San Francisco Examiner, and this is a quotation, Mr. Martin, to which I would particularly call your attention because this quotes you as having said — "'The C.A.B. Members have "isolated themselves" from influence by mail or wire, . . . Our only recourse is to subject them to the same perfectly legitimate pressures they get from the lobbyists of other cities. We have reason to believe the City has not gotten all it might from the C.A.B. because the City has not used this kind of pressure before.' "

[5469]

Is this quotation of your statement correct?

Mr. Martin: I would say substantially correct. However, I believe I said "The Board has had to isolate itself from telegrams and letters because they got so many of them it was impossible to do business that way," and I think that I was referring at the time I made this remark to the fact that if we did not get the Congressmen from Northern California and our Senatorial representatives behind us that the C.A.B. had no legitimate way of knowing the great interest we had in this subject, and inasmuch as we are asking for expedited hearing the C.A.B. had to realize that this was a matter of more than ordinary importance or it certainly would never take the matter out of its usual routine and the way the docket came up.

Possibly and undoubtedly the word "pressure" — at the time, let me say I was being cross-examined by the Board of Advisors Finance Committee, and the word "pressure" was undoubtedly a silly word to use. However, I meant to say, and I did say time and time again during this long procedure that what we were trying to do was to get the interest of San Francisco before the Board in the most effective and legitimate way which I believe is traditionally the representations of our Congressmen and Senators to the Board.

Chairman Durfee: I would like to ask, Mr. Martin, whether you would be willing to make an appropriate statement to that effect to the San Francisco Examiner to correct this? What you

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now say is apparently an erroneous use of the word "pressure."

I wish to make it clear that after having read this article it was with some reluctance that the Board agreed to meet with you at all. If the solicitude of this Board for the plight of the cities such as San Francisco — if our willingness to enter into a field such as this despite our reluctance to have this type of ex parte proceeding — if this willingness of this Board to enter into such a presentation is to be characterized by the people who come here as an opportunity to turn on pressure, we will stop it right now.

I might add we are under investigation by a Committee of Congress right now as to whether this is an independent agency or whether we are subject to pressure. This article in the Examiner just preceding your arrival here hardly sets the stage for this Board to conduct the type discussion which we are pleased to have with cities and have always been pleased to have and have always been pleased to take up the time necessary to do it.

Mr. Martin: If any error has been made, it is my error and I certainly hope the people of San Francisco and Northern California will not be penalized by my error. This hearing actually occurred some two or three weeks ago. There was a subsequent hearing before the Board of Advisors. I corrected this mistake, but I am willing to make any type statement the Chairman thinks in order to clarify what I said and to explain it, and if necessary to apologize to the Board.

[5471]

Chairman Durfee: The Board has decided that whatever our reaction may have been to your statement it is not going to prejudice the City of San Francisco or your presentation here, but I do feel that the Board would appreciate a suitable correction by you as representative of the City of San Francisco. I will accept your comments as they have been made here today.

Are there any other questions from any other member of the Board?

I might say that the Board has discussed — I think I should inform you now that the Board has discussed the advisability of a public statement ourselves in this matter. It is a matter of grave concern to us. I might say that I think the use of the word "pressure" in the context of which you used it before the City Advisors Finance Committee —

Mr. Martin: That is correct, and I am sure that you have had experience with Congressional Committees. Let me assure you I was undergoing a rather hostile cross-examination and period at that time and it was not part of my formal presentation.

Chairman Durfee: I accept that because I think your use of the word "legitimate pressure" is, itself, a contradiction. I think it is equivalent to say "legitimate illegitimacy."

Mr. Martin: I hope we can stress the illegitimate part.

Chairman Durfee: Is there anything further to come before the Board?

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Anyway, let me assure you we harbor no ill will on your presentation.

You may proceed.

Mr. Martin: First, I would like to thank the Board for giving us its time in this matter, and for sending Mr. Miller of your staff out to the city to investigate personally our needs.

We could have brought a much larger delegation but Mr. Miller saw most of the people in San Francisco, and anybody who comes 3,000 miles is going to want to have something to say, so I thought it might lessen the time of the Board if I represented all the civic aspects, and Mr. Schlesinger represented all business aspects of the city.

Quite frankly, Mr. Chairman, I was only sent here, and I am really only prepared to direct general remarks to the need of our transcontinental service. I don't want to interfere or impinge upon the ruling that you made, but I would like, without particularly discussing the docket which is before you at the moment, to discuss our general long haul transcontinental needs; in other words, the New York-to-San Francisco non-stop, because, quite frankly, that is a matter of urgency and almost desperation in San Francisco.

Chairman Durfee: Perhaps the record should show that there is pending before the Board at this time a motion by American for expeditious hearing. Its application to serve

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New York-San Francisco non-stop, which was denied by the Board. Motion was filed on May 3d, a motion was denied on the 26th, but the Board did announce that it had directed the staff to review the problem of New York-San Francisco air service, and to report to the Board on or about December 1, 1957.

Now, I might inject there that the report of the staff has not yet reached the Board. We expect it to reach us this week.

There is also pending, I understand of concern to you in the matter, certain foreign air carriers who have desired a co-terminal at Los Angeles. I take it that what you wish to discuss in a general way is the problem presented without specifically discussing this?

Mr. Martin: With that understanding, I have a few notes. I thought I better say some things. I thought I had said them all.

The first thing I would like to point out to the Board personally, and I am sure you are aware of it in a general way, and you have read the figures in the brief, but I would like to point out the tremendous importance of the market that we are talking about. Figures have recently come out, and within a 50-mile radius of the San Francisco Airport there now live 3,350,000 people. In Northern California, all of which is served by the San Francisco Airport as its major long-haul terminal, there are over six million people. So that we are talking of one of the largest markets in the United States, and

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also one of the fastest growing.

Since the last war, World War II, strangely enough the San Francisco Bay area is growing faster than the Los Angeles area. While the Los Angeles growth is still larger in number, we are growing faster. The San Francisco Bay area is rapidly becoming the center of the atomic energy business of the United States, General Electric, Westinghouse, Aero Jet, American Radiator, all are locating their major atomic energy plants right on the San Francisco peninsular, or over in Alameda County. It is just inevitable that San Francisco is going to become the atomic Pittsburgh, more or less, of the future.

We have the University of California, Stanford, and we also have a climate which engineers seem to like to work in, and engineers work these days where they like the climate.

I can't tell you how we feel in the area that we are going to go ahead faster, and in a better way, than any other area in the United States. Obviously, we can't do this unless we have the transportation that will permit us to do it. When these national concerns make their surveys, when they talk about transportation now they are talking about air transportation. The only time railroads figure in is when they are talking about freight.

Our air pattern, our air flow pattern, is the most important thing to us at the present point. I don't think San

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Francisco has been aroused over any issue for a long time, and I do think that I can honestly say that at the present we feel strongly — and I am not only talking of the city government, but the press, and all the business organizations. We feel strongly that if we do not get a well balanced and adequate traffic pattern, that we are going to suffer greatly. In suffering greatly we are probably going to suffer mainly to Los Angeles, and that is something that is rather abhorrent to us, as you probably know, and it is something that we feel that we have to go all out to make certain it doesn't happen.

The need for an increased non-stop service to New York first showed up, as far as we were concerned, in the financial studies that were made for our bond issue which was passed last year. We already have over 50 million dollars invested in our airport, and we are putting in another 25 million dollars in an effort to stay ahead on the coast. The studies showed the basic thing upon which all of our air transportation hung was the New York-San Francisco non-stop.

We people out there face east. We have to. We will for the foreseeable future. You in the East are not so conscious of us in the West, except for movie stars or Bay bridges or something like that, but in our business and our workings we are continually facing east. Our people are going and coming all the time.

Mr. Gurney: I would like to interject there that Mr.

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Minetti is from Brooklyn, and the Director is from Florida, but our Chairman is from Wisconsin. That is a little farther west. My home is South Dakota, so we aren't all from the East.

Mr. Martin: I wasn't specifically referring to the Board, but the whole eastern people — I worked in New York, and I know that you are not conscious of the West, except when somebody brings it to your attention, but we in the last — it is either Washington or New York, and all business, all Government is geared with one eye at home and the other eye back east. It is just terribly important to us that we receive service which first is adequate for our community, and we do not believe at the present time our non-stop service to the East is adequate, and, second, is competitive with the other West Coast communities, with whom we are struggling to get the business, which is available.

As you gentlemen well know, on evidence taken some four years ago your staff decided that a third non-stop would be justified. We feel that what has happened in the last four years has made it imperative that we get this added service. The history of competition and services between Los Angeles and San Francisco is pretty black for San Francisco, and let me say that nobody out there is blaming the Board for the disparity in our service, or the lateness in our service. We are mainly responsible, ourselves, for any lack that we might be suffering at this time, complete lack of interest, community interest, in

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these problems, and you can't expect anybody to listen to us if you don't first talk, yourself.

As a matter of fact, we think that in view of our past performance, why, the Board has granted San Francisco many things that probably we had no right to expect. But now with these jets coming, if we are eight months or a year behind Los Angeles in securing jet service, we feel that it will just be a tremendous blow to Northern California, the entire area of Northern California, and we are right up against the line on this thing.

In our struggle to get foreign carriers, of which you spoke, it is quite obvious that our competition is Seattle and Los Angeles, and the domestic traffic flow pattern determines in a large measure who is going to get these foreign carriers. While we are primarily interested, of course, in the American carriers, the foreign carriers are coming and we want to be in a position to get our share of them.

I don't want to continue these remarks too long. I just want to again say to the Board that I was reading these briefs over as I came in today, and I was struck by the fact that the printed word just doesn't give the picture.

Mr. Minetti: I don't think we ought to discuss —

Mr. Martin: I apologize. I am sorry.

I am very grateful of the opportunity to come before you gentlemen and personally tell you of the tremendous interest

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that we have in this, and to be quite honest with you, to feel that we are asking for something in an expanded service to New York to which we are entitled, and which we must continue to pursue until we secure it. The entire community is determined on this matter, and I am merely one representative of it, but I just can't stress to you gentlemen how tremendously interested we are in this question, and how vital, absolutely vital, in our view it is to the entire future of our area.

I would like to conclude by again thanking you, and I would like to introduce Mr. Schlesinger, who is here representing — he is the vice-president of the Downtown Association, he is representing the Chamber of Commerce, and other business and labor organizations in this presentation.

Mr. Schlesinger: Thank you very much.

Mr. Chairman and members of the Board, the people I represent appreciate this hearing today. In my capacity I represent approximately 1,100 memberships in downtown organizations in San Francisco. Those are small businesses and large businesses. In addition, the San Francisco Labor Council is backing up the statements made by Mr. Martin and the Public Utilities Commission as to the necessity for additional non-stop service from San Francisco to New York.

Our Downtown Association passed a resolution requesting an expedited hearing for a third non-stop service between San Francisco and New York.

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Chairman Durfee: What is the name of this Downtown Association?

Mr. Schlesinger: That is the San Francisco Downtown Association.

Between San Francisco and New York on the basis that it is absolutely necessary. One of the main reasons, and I might say that these reasons were based on an independent and completely separate survey made by our committee on transportation, were based on the fact that we have to eliminate this present discriminatory and unfair pattern of service that San Francisco receives in comparison to that given Los Angeles, and, also, the major East Coast terminals, and we say that because San Francisco is becoming more and more important as a commercial and business terminal.

Many new stores are opening in San Francisco as direct branches of New York firms. Abercrombie & Fitch are setting up a tremendous new store in San Francisco. Brooks Brothers is contemplating a major store in San Francisco. They now have a small store. Most of the major insurance companies are setting up entire separate organizations in San Francisco, as well as many banking investment firms. These are coming at a rapid pace, and that means a tremendous amount of additional travel between the two cities.

In addition to that, our business activity with the Far East is expanding. That means both American and foreign

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carriers that are coming in to San Francisco require additional and direct service to New York and from my own personal experience, because I travel to New York four or five times a year, I can explain to you that in many cases during the peak travel season it is necessary to be rerouted through Los Angeles because of the inadequacy of the number of flights that actually terminate or originate in San Francisco.

As a result of these items, plus the fact that Mr. Martin did not mention, San Francisco has a capital investment in our International Airport for every single man, woman, and child. It represents $100 per capita, and that is the highest in the nation. We are very proud of it, and we are very proud of our progress.

Mr. Martin touched on the importance of the defense program in the Bay area. It is expanding very, very rapidly. Our population and growth is fantastic. We feel if we get this expedited hearing, and if we get this non-stop service, that it will come at the time of the jet program, and we feel that even now it is important, and it will be even more important then, so we ask you to give us your consideration.

Thank you.

Chairman Durfee: Are there any questions?

Mr. Gurney: I have none.

Mr. Hector: One question you mentioned, or necessary criticism that flowed at the time of your new bond issue for the

airport there, there was a general determination made at that time that transcontinental or long-haul travel is the basic foundation of your airport. Do you have any figures at all as to the percentage of passengers arriving in San Francisco from long-haul flights as opposed to short-haul flights?

Mr. Martin: Mr. Hector, I don't and I don't know that I would be the person that would be qualified. Obviously our greatest single segment of business is Los Angeles-San Francisco travel. We have some 700, and, let us say 80, passengers a day for New York, alone, and I couldn't give you the percentage.

After all, I am afraid that when it comes to the specifics in this problem I am not the man to answer the question.

Mr. Gurney: You say you had 780. As of what period?

Mr. Martin: September, 1956, air traffic, average daily, San Francisco to New York, 785.8 are the figures that I have here.

Mr. Gurney: What was it an increase over a few years prior to that time?

Mr. Martin: That would be an increase. Everything out there, just like every other aviation activity, is increasing. We are over three and a half million passengers, annually, now. We were supposed to reach three million passengers in 1960, according to the predictions made when we built the airport. We are over three and a half last year. This year, again, we will probably have another 12, 15 percent increase. That is the way they are running.

The number of flights goes down and the number of passengers goes up. The airport now instead of lasting to 1970 will be lucky to last until 1963, without building a satellite terminal in the place.

Chairman Durfee: Are there any comments or questions by the members of the staff who are here?

Thank you very much, gentlemen.

I wish to say on behalf of the Board that we appreciate your presentation, and I believe that I could characterize your presentation, your very effective presentation, and one that remained within the bounds of propriety as we indicated, without any discussion as to specific cases.

Mr. Martin: Mr. Chairman, just one thing, in view of your previous remarks, I would like to put on the record that for the Board's information we are also very anxious to get these foreign rights along with Los Angeles, if the rights are granted. So there will be no misunderstanding that we didn't want those rights.

Chairman Durfee: The foreign air carriers being routed to San Francisco?

Mr. Schlesinger: Yes, it is very vital to us.

Chairman Durfee: Thank you very much, gentlemen.

Mr. Martin: Thank you.

(Whereupon, at 12:15 p.m., the conference was closed.)

[5483]

Application for Production of Staff Report

To Examiner Walter W. Bryan:

Pursuant to Rule 19(g) of the Board's Rules of Practice, Trans World Airlines, Inc. hereby asks the production of the staff report heretofore submitted to the Board on or about December 2, 1957 in the above entitled proceeding.

In support of such application, TWA shows the following:

(a) On June 26, 1957 the Board directed a staff report to be submitted on or about December 1, 1957 "so that it [the Board] may examine the public need for an early hearing on the issue of [San Francisco-New York] nonstop service";

(b) The minutes of the Board's proceedings of December 2, 1957 contain the statement of the Chairman of the Board that the staff report so ordered would submitted "this week," or "in the very near future."

(c) Board Orders E-12103 and 12337, dated January 13, 1958 and April 9, 1958, respectively, directed expedited action on American's proposal on the basis _inter alia_ of "the existence of facts indicating that there may

[5484]

be service deficiencies and may be a need for the grant of additional nonstop rights";

(d) TWA is authorized by its certificate of public convenience and necessity to provide nonstop service between San Francisco and New York and has the corelative duty under the Civil Aeronautics Act to provide, in conjunction with other authorized carriers, adequate service between those points. Hence, it is clearly a party which may be affected by the Board's final order herein, and, as such, is entitled to the production of any and all material which the Board may have considered in reaching the conclusion quoted in (c) above. *Carstens* v. *Pillsbury*, 172 Cal. 572, 158 Pac. 218 (1916); *Beredu Mfg. Co.* v. *Industrial Board*, 275 Ill. 514, 114 Q.E. 275 (1916); *Lindsey* v. *Public Utilities Commission*, 111 Ohio St. 6, 114 N.E. 729 (1924); *Chew Hoy Quong* v. *White*, 249 Fed. 869 (CCA 9th, 1918); *Saltzman* v. *Stromberg-Carlson Telephone Mfg. Co.*, 60 App. D.C. 31 (1931); *Communist Party of the United States of America* v. *Subversive Activities Control Board* _______ App. D. C. _______ (Case No. 11850, January 9, 1958). Under the circumstances of this proceeding, the staff report is clearly encompassed within this requirement.

(e) Production of the report at this time is essential to enable TWA to analyze all facts and conclusions therein contained in adequate time for hearing in this matter, whereas production at the time of hearing might require an extended adjournment thereof to permit such analysis.

WHEREFORE TWA asks the immediate production of the report heretofore identified.

HENRY P. BEVANS
Attorney for
Trans World Airlines, Inc.

April 29, 1958

[5485]

Application for Subpoena duces tecum

To Examiner Walter W. Bryan:

Pursuant to Rule 19(g) of the Board's Rules of Practice, Trans World Airlines, Inc. hereby asks that you direct the attendance at the hearing herein on this day of Messrs. E. Bruce Miller, John W. Dregge and Irving Roth, and that you direct the production of any and all studies, analyses, reports and the like prepared by said persons in any way related to the issue of service by an additional nonstop carrier or carriers between San Francisco and New York. Further, TWA asks, that in the event such studies, analyses, reports and the like are not now in the posession or control of said persons, you also direct the attendance of John Doe, said John Doe being the person within the Civil Aeronautics Board now having possession thereof whose identity is not more specifically known to TWA.

In support of such application, TWA shows the following:

(a) On June 26, 1957 the Board directed a staff report to be submitted on or about December 1, 1957 "so that it (the Board) may examine the public need for an early hearing on the issue of (San Francisco-New York) nonstop service";

[5486]

(b) The minutes of the Board's proceedings of December 2, 1957 contain the statement of the Chairman of the Board that the staff report so ordered would be submitted "this week," or "in the very near future."

(c) Upon information and belief, the above named persons were responsible for the preparation of, and did in fact, prepare such a report.

(d) Board Orders E-12103 and 12337, dated January 13, 1958 and April 9, 1958, respectively, directed expedited action on American's proposal on the basis inter alia of "the existence of facts indicating that there may be service deficiencies and may be a need for the grant of additional nonstop rights";

(e) TWA is authorized by its certificate of public convenience and necessity to provide nonstop service between San Francisco and New York and has the correlative duty under the Civil Aeronautics Act to provide, in conjunction with other authorized carriers, adequate service between those points. Hence, it is clearly a party which may be affected by the Board's final order herein, and, as such, is entitled to the production of any and all material which the Board may have considered in reaching the conclusion quoted in (d) above. Under the circumstances of this proceeding, the staff report is clearly encompassed within this requirement.

(f) The attendance of said persons and the production of the report and all studies, analyses and the like related thereto is essential to enable TWA to analyze the facts and conclusions therein contained.

HENRY P. BEVANS
Attorney for
Trans World Airlines, Inc.

September 18, 1958

[ ]

In The
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 15,414

UNITED AIR LINES, INC.,
Petitioner,
v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION OF UNITED AIR LINES, INC., FOR JUDICIAL REVIEW OF AN ORDER OF THE CIVIL AERONAUTICS BOARD

To the Honorable the Judges of the United States Court of Appeals for the District of Columbia:

United Air Lines, Inc., presents this petition for judicial review of an order of the Civil Aeronautics Board, and, in support thereof, respectfully represents and alleges as follows:

I.

THE NATURE OF THE PROCEEDING

This petition for review arises out of a proceeding before the Civil Aeronautics Board in which two applicants, American Airlines, Inc., and Northwest Airlines, Inc., prosecuted applications for authority to conduct nonstop air service between New York and San Francisco in competition with the existing nonstop services of petitioner and

[ ]

Trans World Airlines, Inc.* Review is sought of Order E-14412 entered by the Civil Aeronautics Board on September 2, 1959. Said order, adopted by a 3 to 2 vote of the Board, purported to certificate American as a third nonstop carrier between New York and San Francisco, effective November 1, 1959.

Petitioner has timely filed a petition for rehearing, reargument and reconsideration and a petition for a stay of the foregoing order with the Civil Aeronautics Board. Neither of those petitions has been acted upon by the Board. Petitioner is filing this petition for review and the subsequently described petition for a stay with this Court at this time for the following reasons: First, American's New York-San Francisco nonstop authority is scheduled to become effective in 10 days and the irreparable injury that petitioner will sustain will begin at that time unless relief is theretofore granted. Secondly, whether or when the Board may take action on the petitions below is unknown. One member of the majority of the Board resigned after adoption of the order under review and it is conceivable that the remaining Board members may be equally divided with respect to the disposition to be made of those petitions. Thirdly, the Court of Appeals for another circuit has held that the filing of a petition for rehearing, reargument and reconsideration does not toll the 60 day statutory period following a final order of the Board within which to file petitions for review. Consolidated Flower Shipments, Inc. v. CAB, 205 F.2d 449 (C.A. 9, 1953). Although this Court may not agree with that ruling, protection of petitioner's

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* The various air carriers involved, other than petitioner, will hereinafter be referred to by commonly used abbreviations of their names: Trans World Airlines, Inc. as "TWA", American Airlines, Inc., as "American" and Northwest Airlines, Inc., as "Northwest."

[ ]

interests requires that it file this petition within 60 days after September 2, 1959, the date of the Board order here under review.

II.

JURISDICTION AND VENUE

This petition is filed pursuant to Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, 49 USC 1486, and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 USC 1009.

Section 1006 of the Federal Aviation Act provides, in part, that any order issued by the Civil Aeronautics Board shall be subject to review by the Courts of Appeals of the United States, or by the United States Court of Appeals for the District of Columbia, on petition filed within sixty days after the entry of such order by any person disclosing a substantial interest therein. Further, the statute provides that such petition for review shall be filed in the court for the circuit in which the petitioner resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, and provides that upon transmittal of a copy of the petition to the Board the court in which such filing is made shall have exclusive jurisdiction to affirm, modify or set aside the order complained of, in whole or in part, and, if need be, to order further proceedings by the Board.

Section 10 of the Administrative Procedure Act reaffirms the method and manner of review provided for in the Federal Aviation Act.

Petitioner, United Air Lines, Inc., satisfies all of the foregoing jurisdictional and venue requirements. Petitioner is directly affected by the Board's order in question and, therefore, has a substantial interest therein. Moreover, this

petition is being filed within sixty days after the date of the Board order under review.

[ ]

III.

STATEMENT OF FACTS

1. The proceeding giving rise to this petition for review is commonly known as the "New York-San Francisco Nonstop Service Case." Petitioner and TWA have provided New York-San Francisco nonstop service for a number of years. Currently, they provide such service with jet aircraft. Additional service with similar equipment was proposed by each of the applicants. The ultimate issue in the proceeding below was whether the public convenience and necessity required New York-San Francisco nonstop service by three competing air carriers each operating jet aircraft.

2. The proceeding began when American, on or about May 3, 1957, filed a motion with the Board requesting an expedited hearing on the New York-San Francisco nonstop portion of its application in Docket No. 5903. At that time and up until the present, American's certificates for public convenience and necessity required that American make at least one intermediate stop on flights between those points.

Following answers by petitioner and TWA, the Board on June 26, 1957 denied American's motion but directed its Bureau of Air Operations "to review the problem of the air service pattern between New York and San Francisco and report the results of that study to the Board on or about December 1, 1957" (Order E-11493). The Bureau prepared and submitted such a report to the Board sometime during December of that year. On December 2, 1957, when this report appeared imminent, representatives of the City and County of San Francisco met with members of the Board

[ ]

and its staff in a conference in which petitioner was not given an opportunity to participate.

Subsequently, on January 13, 1958, the Board reversed itself and directed an expedited hearing on American's application. In so doing, the Board emphasized that "an important factor" supporting its action was "the opportunity that will be provided for the Board's first full-scale investigation of the imminent impact of the operation of jet aircraft" and instructed its Examiner to make "specific findings on this issue" (Order E-12103). By Order of April 9, 1958, the Board, in denying petitions of petitioner and TWA for reconsideration of the prior order, reiterated the importance of "a full-scale investigation" into the impact of jet equipment during the course of the proceeding (Order E-12337).

3. After the grant to petitioner and others of leave to intervene, the consolidation of Northwest's application and a prehearing conference, the case came on for hearing before an Examiner on July 30-31, 1958 in San Francisco and September 9-18, 1958, in Washington, D.C.

Evidence submitted at the hearing included traffic, cost and revenue forecasts covering operation of the route in issue. All cost estimates were based on engineering data supplied by aircraft manufacturers as to how they expected their products to perform. Cost and traffic stimulation estimates were necessarily untested at that time because no jet aircraft had yet been delivered to any domestic air carrier. Commercial operation of jet planes in domestic air transport service first began in December 1958.

4. During the presentation by the Bureau of Air Operations at the hearing, TWA filed an application for a subpoena duces tecum with the Examiner requesting production of the previously mentioned Bureau report. The

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Examiner denied this application, adhering to earlier rulings denying similar requests by TWA in its petition for reconsideration of the Board's Order of January 13, 1958, by TWA at the prehearing conference and by petitioner in a motion of May 8, 1958. Of the three latter requests, the first was denied by the Board (Order E-12337), while the remaining two were denied by the Examiner.

5. On February 18, 1959, prior to the Examiner's Initial Decision, petitioner filed a motion with the Examiner to reopen the record for the purpose, among others, of receiving evidence of jet operating costs derived from actual operating experience which, for reasons above shown, could not have been ascertained until after the close of the hearing. In its motion, petitioner pointed out that the Board had made the economic impact of jet equipment a primary issue in the proceeding. Further, petitioner demonstrated that operating experience had shown that the cost estimates of record were unreliable and that additional costs were being incurred which were unforeseen when the expense estimates of record were prepared. Additionally, it called attention to the fact that American, four weeks earlier in another proceeding, maintained that its own estimates of jet costs, made as recently as six months previously, were seriously understated. Nevertheless, this motion was denied. Petitioner subsequently renewed the motion before the Board where it again was denied.

6. The Examiner's Initial Decision was issued on March 9, 1959. While the Examiner broadly stated that three carriers would "be able to adjust their services to meet the demands [of the traffic] on a profitable basis," that statement was not supported by any findings whatsoever as to revenues and expenses. The Examiner's ultimate conclusions were that the public convenience and necessity required a third nonstop air carrier between New York and

San Francisco and that American should be authorized to provide the service.

7. After the filing of exceptions to the Initial Decision and briefs in support thereof, the case was set for oral argument before the Board pursuant to requests by petitioner and others. By notices dated April 3 and April 15, 1959, the proponents of additional New York-San Francisco nonstop service were given 2 hours and 20 minutes for argument,

while petitioner and TWA were allotted 30 minutes each. Because of the insufficiency of time allowed to it and the disparity thereof in comparison with the time given to its adversaries, petitioner promptly requested additional time for argument. This request was denied.

At the oral argument, held on April 29, 1959, the foregoing disparity in time became even greater. Without prior notice to petitioner, 13 Congressmen and Senators — all urging adoption of the Examiner's Initial Decision favorable to American — appeared at oral argument and were given another 2 hours' time. As a result, petitioner and TWA together received a total of 1 hour for oral argument as contrasted to 4 hours and 20 minutes allotted to their adversaries.

8. On May 15, 1959, the Board issued a Press Release announcing that it had tentatively voted 3 to 2 to grant American's application. This release contained no findings whatever. Such findings and conclusions as the Board made were first set forth in its subsequent formal opinion and order.

9. The Board's formal opinion and order under review, adopted on September 2, 1959, adhered to the result announced in the prior Press Release and purported to authorize American to conduct New York-San Francisco nonstop service effective November 1, 1959. Following an

[ ]

approach similar to that taken by the Examiner, the Board broadly asserted that three carriers by reducing their planned and proposed service could operate the New York-San Francisco route "at above break-even load factors." Again, however, that general statement was not supported by findings as to revenues and expenses.

10. Both the Press Release and the Board's formal opinion recited that Member Hector joined with Vice Chairman Gurney and Member Minetti in forming the majority voting for American's certification. However, Member Hector, whose vote was decisive, did not hear oral argument and there was no indication at any time during the argument that he would participate in the Board's decision.

The opinion of the Board is inconsistent with opinions expressed in recent Board cases by two members forming the majority in the proceeding below — Vice Chairman Gurney in dissents of September 3, 1958 and May 7, 1959, in the Great Lakes - Southeast Service Case and Member Minetti in a dissent of April 1, 1957, in the Eastern Route Consolidation Case. No explanation has been given for the departure by these members of the Board from their earlier views.

11. On September 22, 1959, petitioner and TWA filed petitions for rehearing, reargument and reconsideration of the foregoing decision and order. In those petitions, petitioner and TWA requested a rehearing for the purpose, among others, of receiving evidence which demonstrated that experienced jet costs were even higher than when petitioner filed its earlier motions to reopen the record. Further, those petitions, inter alia, called attention to ex parte attempts to influence the Board and its staff throughout the case. They demonstrated that in excess of 120 ex parte communications had been sent to the Board or mem-

[ ]

bers of its staff, and that in whole or in part these communications had been written, inspired or solicited by American and the City and County of San Francisco. Further, they demonstrated that these communications were in direct violation of the Board's Principles and Rules of Practice, as well as fundamental principles of due process.

12. To date, the Board has not passed upon the above described petitions for rehearing, reargument and reconsideration or petitioner's petition for a stay of the Board's above order pending this Court's decision in this case.

13. The foregoing chronology sets forth in summary form the handicaps under which petitioner has been forced to try this case. Time and time again petitioner was denied the opportunity to make an adequate presentation of its position, to see that all facts essential to an intelligent determination of the issues were before the Board, or fairly to answer

arguments of its opponents. The total effect of the errors committed throughout the proceeding has been to deny petitioner due process and a fair hearing.

IV.

THE POINTS UPON WHICH PETITIONER INTENDS TO RELY

Petitioner, United Air Lines, Inc., submits that Order E-14412, adopted by the Civil Aeronautics Board on September 2, 1959, is invalid and erroneous for the following reasons:

1. Ex parte attempts by formal parties to the proceeding having interests adverse to those of petitioner, directly and indirectly, to influence the Board's decision in this case violated Sections 300.2(a) and 300.2(c) of the Board's Principles of Practice and deprived petitioner of due process of law and of a fair hearing as guaranteed by the Administrative Procedure Act and the Federal Aviation Act.

[ ]

2. The acceptance by the Civil Aeronautics Board, throughout the course of the proceeding, of ex parte communications calculated to influence the Board's decision adversely to petitioner violated the Board's Rules of Practice, specifically Rules 14, 18 and 24(j), and deprived petitioner of due process of law and of a fair hearing as guaranteed by the Administrative Procedure Act and the Federal Aviation Act.

3. The denial by the Civil Aeronautics Board of petitioner's timely filed motions to reopen the record to receive competent, relevant, material and available evidence of actual operating costs of jet aircraft which were placed in commercial service only after the conclusion of the hearing and which evidence would have shown that the Board's findings as to the economic feasibility of three carrier competitive service are erroneous and that certification of a third competitor would result in substantial losses for all carriers involved, constituted an abuse of discretion and deprived petitioner of a fair hearing.

4. The Civil Aeronautics Board and the members thereof by the following additional actions, both severally and in combination with each other and with the other errors alleged herein, further deprived petitioner of due process of law and of a fair hearing as guaranteed by the Administrative Procedure Act and the Federal Aviation Act:

(a) Refusal by the Board and its Examiner to direct production, or in camera inspection by the Examiner, of a report prepared by the Board's Bureau of Air Operations

[ ]

in conjunction with the proceeding and requested by petitioner for use in preparation of its case and cross-examination of the Bureau's witness;

(b) Denial to petitioner of adequate time for oral argument or an amount of time reasonably equal to that allotted to its adversaries;

(c) Failure of the Board member casting the decisive vote to hear oral argument;

(d) Failure of the other two members of the majority to set forth in the Board's opinion reasons for their departure from opinions recently expressed by them in prior proceedings; and

(e) Announcement by the Board of its vote by a Press Release prior to preparation and issuance of its formal opinion and order in the proceeding.

5. The record upon which the order of the Civil Aeronautics Board purports to be based is fatally defective in that it is devoid of reliable and probative evidence as to the cost of operating jet aircraft which is relevant to an essential issue in the proceeding, viz., whether nonstop service over the route involved by three air carriers would, or would not, be economically feasible.

6. The Board's findings and conclusion that three carriers could operate nonstop over the New York-San Francisco route without sustaining substantial financial loss, upon which the Board's decision in part

rests, are without support in underlying findings, are not supported by substantial evidence in the record as a whole, and are contradicted by facts disclosed by the actual operation of jet

[ ]

aircraft after the close of the hearing which the Board refused to consider, by denying requests to reopen the proceeding.

7. The Board's findings and conclusion that the services of petitioner and TWA, though not inadequate, did not fully meet the needs of the traveling public and that the public would receive the benefits of competition if American were granted nonstop authority between New York and San Francisco rest upon subsidiary findings that are in direct conflict with undisputed evidence, are not supported by substantial evidence in the record as a whole, and are predicated inaccurately and improperly upon findings as to a short period of time preceding delivery from the manufacturers in early 1957 of new aircraft ordered 2 1/2 years earlier and with which petitioner and TWA immediately enlarged their service pursuant to plans established well in advance of the proceeding below.

8. The Board's findings and conclusion as to the volume of New York-San Francisco nonstop traffic in 1960 and succeeding years are not supported by substantial evidence in the record as a whole and disregard facts establishing that the Board's forecast embraces traffic not available for nonstop service between those points.

9. The Board failed to set forth reasons for its rejection of petitioner's traffic forecast and to make findings with respect to certain of petitioner's exceptions to the Examiner's Initial Decision to which the Board's attention was specifically directed on petitions for rehearing, reargument and reconsideration.

10. The Board's findings and conclusion that the grant

[ ]

of New York-San Francisco nonstop authority to American is required by the public convenience and necessity are arbitrary and capricious and not supported by substantial evidence in the record as a whole.

V.

PETITION FOR STAY

Concurrently herewith, petitioner, United Air Lines, Inc., is filing a petition to stay the above described order of the Civil Aeronautics Board and the amended certificate of public convenience and necessity issued to American Airlines, Inc., pursuant thereto, pending review of said order by this Court.

VI.

PRAYER FOR RELIEF

WHEREFORE, petitioner, United Air Lines, Inc., prays that this Court review Order E-14412, adopted by the Civil Aeronautics Board on September 2, 1959; that a copy of this petition be transmitted to the Civil Aeronautics Board; that said Board be required to certify and file in this Court a transcript of the record of the proceeding in which said order was entered, a stenographic transcript of the ex parte conference between the Board and representatives of the City and County of San Francisco held on December 2, 1957, and all ex parte communications received by members of the Board and any Board employee which relate to said proceeding together with acknowledgments of the same; that upon review the aforesaid order of the Civil Aeronautics Board and the amended certificate of public convenience and necessity issued to American Airlines, Inc.,

[ ]

pursuant thereto, be set aside; and that the Court grant to petitioner such other and further relief as the Court may deem proper.

Dated at Chicago, Illinois, this 22nd day of October, 1959.

Respectfully submitted,

H. TEMPLETON BROWN,

ROBERT L. STERN,

FLOYD M. RETT,

231 South La Salle Street,
Chicago 4, Illinois,

James Francis Reilly,
1625 K Street, N.W.
Washington 6, D. C.,

Attorneys for Petitioner,

UNITED AIR LINES, INC.

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT,
231 South La Salle Street,
Chicago 4, Illinois,

Of Counsel

[ ]

[CERTIFICATE OF SERVICE]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.
CIVIL AERONAUTICS BOARD,
Respondent.

No. 15,415

PETITION OF TRANS WORLD AIRLINES, INC. FOR REVIEW OF ORDER OF THE CIVIL AERONAUTICS BOARD

To the Honorable Judges of the United States Court of Appeals for the District of Columbia Circuit:

Petitioner, Trans World Airlines, Inc. (TWA), respectfully shows:

1. Petitioner is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Delaware.

2. Petitioner is an air carrier engaged in the transportation of persons, property and mail by aircraft between various points, including San Francisco/Oakland and New York/Newark, pursuant to duly issued certificates of public convenience and necessity.

3. Petitioner seeks review of Order No. E-14412 of the Civil Aeronautics Board (hereinafter called the "Board") adopted by the Board on September 2, 1959, and certain orders and rulings preliminary thereto, in the proceeding entitled "*New York-San Francisco Nonstop Service Case*". A copy of Order No. E-14412 is attached hereto as Exhibit A. This order purports to authorize American Airlines, Inc. (hereinafter called "American") to engage in air transportation of persons, property and mail without restriction between San Francisco/Oakland and New York/Newark.

[ ]

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

4. The proceeding below involved an application by American for amendment of a certificate of public convenience and necessity to permit New York-San Francisco nonstop operations by that carrier.* Upon motion of American the Board severed its application from a broader proposal and accorded the application preferred hearing.

5. The proceeding was paralleled by a series of ex parte communications between various persons and the Board, extending in time from the filing of American's motion for severance and immediate hearing until after the case was submitted for final decision following oral argument. These communications bore upon virtually every issue in the proceeding. Included among the communications was an ex parte oral argument addressed to the Board by a party to the proceeding.

6. Although the Bureau of Air Operations,

a division of the Board's staff, participated as a party, petitioner was denied access to a report bearing directly upon the issues in the proceeding prepared by the Bureau at the direction of the Board. Subsequently, the position of the Bureau, which was adverse to petitioner, was in large part adopted in the Examiner's Initial Decision.

7. The Board's final decision represents an adoption of the Examiner's Initial Decision, which failed to pass upon numerous issues of fact, law and policy raised by petitioner.

8. The basic issue in the proceeding was resolved by the vote of a member of the Board who had not heard oral argument.

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* A similar application by Northwest was denied.

FACTS UPON WHICH VENUE IS BASED

9. This petition is filed pursuant to Section 1006 of the Civil Aeronautics Act of 1938, 52 Stat. 1024, 49 U.S.C. §646 (hereinafter called the "Act")* and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. §1009.

10. Section 1006 of the Act provides that orders issued by the Board shall be subject to review by the United States Court of Appeals for the District of Columbia on petition filed within sixty days after the entry of such order by any person disclosing a substantial interest therein. A similar method and manner of review is provided for in Section 10 of the Administrative Procedure Act.

[ ]

11. Petitioner has a substantial interest in the Board's order with respect to which review is sought. Since petitioner provides air transportation of persons, property and mail between San Francisco/Oakland and New York/Newark, the Board's order authorizing American to provide air transportation without restriction between these points will have a direct, adverse effect upon petitioner.

THE GROUNDS ON WHICH RELIEF IS SOUGHT

12. The grounds on which petitioner seeks relief are as follows:

A. Petitioner was denied the due process of law to which it was entitled under the Act, the Administrative Procedure Act and the Constitution of the United States in the following respects:

(1) The fact that, throughout this proceeding the Board was subjected to and participated in ex parte communications and contacts with persons supporting the

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* By the terms of the Federal Aviation Act of 1958 the Civil Aeronautics Act of 1938 continues to govern proceedings pending at the time the successor Act went into effect. There is no relevant distinction between the two acts.

applications for additional service, many, if not all, of which communications were authored, inspired or solicited by parties adverse to petitioner, violated petitioner's right to a fair hearing.

(2) Due process was denied petitioner by the fact that the Board substantially and, prejudicially to petitioner, violated its own rules by:

[ ]

(a) participating in the *ex parte* communications referred to above;

(b) allowing, on American's contested motion for an immediate hearing, one of the parties to the proceeding to present *ex parte* oral argument in support of American's motion and application;

(c) receiving evidence and argument in support of American's application after the close of the record.

(3) Petitioner's right to a fair hearing was further violated by the fact that it was denied access to a report prepared by a division of the Board's staff which thereafter participated in the proceeding as a party, which report bore directly upon the issues in the proceeding.

(4) The fact that, under the circumstances here present, a member of the Board participated in the Board's decision and cast the deciding vote against petitioner without having heard oral argument denied petitioner due process.

(5) The fact that the Board refused to reopen the record to receive evidence of marked changes in circumstances resulting from the introduction of operations with jet aircraft denied petitioner a fair hearing.

B. The Board's order does not contain adequate findings supported by substantial evidence, particularly in view of the fact that the Board adopted

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and relied upon, as authority for its conclusions on particular issues, a fatally deficient Examiner's Initial Decision.

C. The Board has failed to apply the standards of Section 401 of the Act, in that in determining the requirements of public convenience and necessity the Board (1) erroneously assumed that the additional service proposed by American is required in spite of its own wholly inconsistent findings that such additional service would otherwise be provided by the existing carriers; and (2) failed to weigh the fact that the service provided by American in the New York-San Francisco market would be at the expense of other markets served by that carrier.

WHEREFORE petitioner respectfully prays that this Court review the said Order No. E-14412 of the Board and the orders and rulings preliminary thereto, and upon such review vacate said order and remand the case to the Board for further proceedings by the Board in conformity with the decision of this Court; and that, unless the Board determines to deny the applications, the Board be instructed to hold, with the aid of a special hearing examiner, an evidentiary hearing to determine the facts as to ex parte activity and its effect upon the qualifications of the applicants and the members of the Board preliminary to a rehearing of the other issues; and that petitioner have such other,

[ ]

further and different relief as to this Court may seem just and proper.

Respectfully submitted,

Warren E. Baker
Attorney for
Trans World Airlines, Inc.
Shoreham Building
Washington, D. C.

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[Filed U.S. Court of Appeals December 15, 1959]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED AIR LINES, INC.,
Petitioner,
v.
CIVIL AERONAUTICS BOARD,
Respondent,
AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

No. 15,414

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.
CIVIL AERONAUTICS BOARD,
Respondent,
AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

No. 15,415

PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of Court, the parties, subject to the approval of the Court, hereby stipulate and agree as follows with respect to various procedural matters, the issues, and the methods and dates for the preparation and filing of the briefs and joint appendix. In the event that a stay should issue herein in response to petitioners' renewed petitions therefor, respondent and intervenors reserve the right to request the Court to establish different and accelerated filing dates.

I

Incidental Procedural Matters

Upon approval of this stipulation and without further order or orders of the Court:

1. These cases are consolidated for purposes of briefing, argument, decision, and all other procedural matters.

[ ]

2. The Board, for purposes of preparation of the joint appendix to briefs and at such time as its counsel deems appropriate, is authorized to release the transcript of record retained in the Board's custody to any printer in the District of Columbia designated by the petitioners.

3. The joint appendix to briefs may be prepared at petitioners' option by a combination of the processes of printing, multilithing, photocopying, or other method permitted by the Court's rules. If combined processes are used, the appendix shall be prepared in its entirety on pages of uniform size not to exceed the maximum specified by the Court's rules for any such process, with the content of each page being governed by the rule applicable to the method employed but without there being any requirement of uniform content for all pages. The purpose of this provision is to minimize costs by enabling petitioners to utilize numerous printing and photocopy plates already in their possession of materials to be reproduced in the joint appendix.

II

Issues

Petitioners' issues are the specifications of error set forth in the petitions for review (TWA's "Grounds on Which Relief is Sought" and United's "Points upon Which Petitioner Intends to Rely"), and the additional one that the Board denied due process to the petitioners by its Order E-14664 refusing to vacate the award to American Airlines or otherwise to protect petitioners' rights. It is expressly agreed that any issue, or any matter or point in relation to any of them, which is not urged by petitioners in their opening briefs shall be considered abandoned for purposes of review herein.

Respondent and the intervenors on its side tender no further issues, but reserve the right to rephrase the petitioners' issues, or to take the position that any matter set forth is unnecessary or irrelevant, or is not open to review.

III

Procedures with Respect to Printing of Joint Appendix and Briefs, and Use of Unprinted Portions of Record

The joint appendix shall contain the materials required to be printed by the Rules of the Court, the materials designated by the parties as hereinafter provided, and this stipulation and the order of the Court approving the stipulation.

All briefs will be served and filed on or before the dates fixed hereinafter with reference to the pages of the certified record ("Tr."). At the time each party serves its brief, it will also serve its designation of the portions of the certified record to be printed in the joint appendix. As soon as all designations have been made, the petitioners shall cause the joint appendix to be printed with the page numbers of the record as certified to this Court appearing at the place where each new record page begins on the printed page of the joint appendix, and running heads showing the record pages appearing thereon shall be printed at the outer top corner of each page of the printed joint appendix. The usual numerical designation of the printed joint appendix will appear in the center of the top of the page.

It is further agreed that any party, in brief or at the hearing in the case, may refer to and rely upon any portion of the original transcript herein which has not been printed to the extent that such portion may be material to the stipulated issues, it being understood that any portions of the record thus referred to will be printed in a supplemental joint appendix if the Court directs the same to be printed.

[ ]

IV

Filing dates

The joint appendix to briefs will be served and filed immediately after it is printed. The time for filing of briefs shall be as follows:

1. The briefs of petitioners and any intervenor or amicus supporting them will be served and filed on or before January 18, 1960.
2. The briefs of respondent and intervenors supporting respondent will be served and filed on or before February 15, 1960.
3. Any reply briefs by petitioners will be filed in accordance with the Rules of the Court.

/s/ James Francis Reilly
Attorney for United Air Lines, Inc.

/s/ Warren E. Baker
Attorney for Trans World Airlines, Inc.

/s/ O. D. Ozment
Attorney for the Civil Aeronautics Board

/s/ Edwin H. Seeger
Attorney for American Airlines, Inc.

/s/ Frank J. Needles
Attorney for the City and County of
San Francisco

Concur:

/s/ C. Edward Leasure
Attorney for Northwest
Airlines, Inc., Applicant
for intervention on the
side of petitioners.

[ ]

[ ]

15,414 & 15,415

Before: Fahy, Circuit Judge in Chambers

PREHEARING ORDER

[Filed December 15, 1959]

Counsel for the parties in the above-entitled cases having appeared before me for prehearing conference pursuant to Rule 38(k) of the General Rules of this Court, and counsel having submitted their stipulation dated December 15, 1959, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this Court, and that the stipulation dated December 15, 1959, and this order be printed in the joint appendix, and it is

FURTHER ORDERED that the above-entitled cases are consolidated for all purposes.

Dated: December 15, 1959

[ ]

[Certificate of Service]

JOINT APPENDIX - VOL. IV

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 31 1962
Joseph W. Stewart
CLERK

NO. 15,414

UNITED AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

NO. 15,415

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

PETITION FOR REVIEW OF ORDER OF THE
CIVIL AERONAUTICS BOARD

Pages 1013 through 1230
Containing Excerpts from Record Pages 5499 thru 7710

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[5499]

Order No. E-15342

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its
office in Washington, D. C.,
on the 7th day of June, 1960

In the matter of the

NEW YORK-SAN FRANCISCO
NONSTOP SERVICE CASE

Docket 9214 et al.

ORDER REOPENING PROCEEDING FOR LIMITED PURPOSES

By Order E-14412 herein, dated September 2, 1959, the Board certificated American Airlines, Inc. (American) to provide nonstop service between New York and San Francisco. Subsequently, by Order E-14664, dated November 19, 1959, the Board denied without further evidentiary hearings certain petitions for reconsideration alleging violations of the Board's Principles of Practice in relation to this proceeding. On May 19, 1960, the United States Court of Appeals for the District of Columbia Circuit entered an opinion upholding the award to American against various challenges other than the ones relating to violations of the Board's rules. United Air Lines, Inc. et al. v. Civil Aeronautics Board, Nos. 15,414, 15,415. The Court remanded the cases to the Board for the limited purpose of holding a hearing to determine, with all convenient speed, the relevant facts on the question of whether the Board's rules were so violated as to require a setting aside of the certification order on review. The order of remand is attached as an appendix.

In view of the Court's decision, it is incumbent upon the Board to proceed promptly with the required further proceedings. To be fully effective, the proceedings will require participation by both the Board's staff and the carrier parties. We deem it advisable that the staff participation in the reopened proceedings be by persons not formerly associated with the case, in part to avoid any suggestion that they would be hampered by positions previously taken and in part because of the nature of the further proceedings. The instant phase of the case is plainly divisible from the prior ones, and the issues now presented are whether there were violations in terms of setting aside the prior order of certification. Our Bureau

[5500]

of Enforcement hence is the logical staff component to participate in the further proceedings, and, since the factual issues are ones of violation, we believe that from a practical procedural standpoint the further hearings should be conducted in a fashion akin to that of an enforcement proceeding.

We therefore have assigned the duty of staff participation to the Bureau of Enforcement, and have instructed the Chief Examiner to designate an examiner herein not previously connected with this case. We intend that this proceeding shall proceed to hearing at the earliest practicable date, and shall proceed to completion as rapidly as circumstances will permit consistently with the objective of ascertaining the relevant facts. No further pleadings or prehearing conference will be required prior to the beginning of hearings.1/ Immediately upon

---

1/ American under date of May 20, 1960 has requested a prehearing conference. We see no reason why such a request should be granted at this time, and, in view of the issues involved, there ordinarily would seem to be no reason for such a conference. Cf. 14 CFR 302.211. However, by analogy to the cited rule, the examiner may subsequently direct any conferences which he deems necessary. We therefore will deny American's request.

their closing the Examiner will fix an appropriate date for the filing by the parties of proposed findings and conclusions to the Board on all issues. Subsequent to the filing of such proposed findings and conclusions the Examiner will issue findings of fact and thereafter will certify the entire record to the Board for tentative decision.[2] Other than for matters herein or subsequently specified, the general rules of practice in economic proceedings will govern these further proceedings.

ACCORDINGLY, IT IS ORDERED:

1. That this proceeding is reopened for the limited purposes of ascertaining the relevant facts and determining (a) whether any party to the Board's proceeding violated the Board's Principles of Practice, and, if so, (b) whether the Board's rules were so violated as to require a setting aside of the order of certification herein.

2. That all prior parties herein shall be deemed to be parties to this reopened proceeding, except that the Board's Bureau of Enforcement is substituted for Bureau Counsel.

3. That any person or persons concerning whom evidence may be received in this reopened proceeding shall, upon request, be permitted to cross-examine and to submit rebuttal testimony.

4. That a copy of this order and all subsequent notices, orders, pleadings, reports, and briefs be served upon the Attorney General of the United States or such person as he shall designate for service, and that the Attorney General, or his designated representative, shall be permitted, if he so elects, to participate herein as amicus curiae.

---

[2] Exceptions to the Examiner's findings will not be entertained other than as an incident to exceptions to the Board's tentative decision.

5. That this reopened proceeding be promptly set down for hearing before a Board examiner not previously connected with this case.

6. That the request of American Airlines, Inc., for a pre-hearing conference is denied.

By the Civil Aeronautics Board:

/s/ Mabel McCart

Mabel McCart
Acting Secretary

(SEAL)

[5541]

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

Volume 2

[5543]
[Tr.28]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

In the Matter of)
REOPENED NEW YORK-SAN FRANCISCO) Docket No. 9214 et al.
NONSTOP SERVICE CASE)

Room 4500
Main Post Office Building
33rd Street and Eighth Avenue
New York, N.Y.
July 18, 1960

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

EDWARD T. STODOLA, Hearing Examiner.

* * * * *

[5562]
[Tr. 47]

Whereupon,

DWIGHT DAVIDSON TAYLOR

called as a witness, having been first duly sworn, was examined, and testified as follows:

* * * * *

[5563]
[Tr. 48]

DIRECT EXAMINATION

BY MR. ROYALL:

Q. Would you please state your full name and address? A. Dwight Davidson Taylor, 1711 Massachusetts Avenue, Northwest, Washington 6, D.C. Business address, American Airlines, 918 16th Street Northwest, Washington, D.C.

Q. Mr. Taylor, I take it you are employed by American Airlines. Would you please state in what capacity you are now employed by them? A. Vice president.

Q. How long have you been employed by American Airlines as vice-president? A. Since late in the fall of 1959, I can't recall the exact date but I was given that title, that it would have been perhaps October or November, I believe.

Q. Prior to that time, in what capacity did you work for American Airlines, if any? A. Assistant to vice president from about June 1958, and prior to that -- no, correction. I think I misstated that. I was assistant vice-president during the period I just covered and prior to approximately June of 1958 I was assistant to vice president, from September or October of 1953. I was not employed by American at any time before that.

* * * * *

[5565]
[Tr. 50]

Q. That would be fine. I would appreciate it if you would.

A. And give you the most accurate picture I can. As of January 1957 and until the next date I would give you, my principal responsibility was liaison work with members of Congress. It was not my sole responsibility by any means.

Occasionally I would have business dealings with various departments of the government. When I became assistant vice-president in about June of 1958, the responsibility broadened, because in that position I was in charge, beginning at that time, of the Washington office.

Because I naturally had a number of acquaintanceships with members of Congress, I still assumed some responsibility in that area. It also became more important for me to be more directly conversant with matters which we had before the CAB, both adjudicatory matters and informal business problems, which it was relevant and proper to deal with the CAB on.

So, too, as to other agencies and departments, Generally speaking, I think it would be fair to characterize it as a typical distinction between one who is in charge of an office and one who is in an office of several people but

[5566]
[Tr. 51]

not in charge, with the normal departmentalization of an office that applies to the latter type of personnel; whereas when you are in charge you have more overall responsibility of being conversant with and making some decisions as to a broader range of activities.

I am speaking in somewhat general phrases, but I think that probably gives you the picture.

* * * * *

[5612]
[Tr. 97]

A. * * *

[5613]
[Tr. 98]

Now, as to specifically advising him about the applicability of Rule 14 and the permissibility of appearance at oral argument or letters in lieu of oral argument, in advance of it, I would assume that this, if it took place, would have been at the time that we discussed the case at the luncheon in April of 1959. And in so far as we discussed oral argument, I am sure that we would have said that it was entirely proper for these men to come down to the oral argument or express themselves in writing, as it had been done repeatedly and as I have heard the Chairman of the Board refer to, as a way of expressing the interests of their own constituents whom they represent. But we didn't talk about the merits of this thing; it was strictly procedural and strictly a question of what he could do if he wanted to.

Q. Let's confine ourselves to Rule 14, -- A. Right.

Q. -- as to whether or not you stated that you explained to Congressmen -- that is, whenever you made contact -- in every case what Rule 14 entailed.

Now let me pursue that one step further: I believe you told me in answer to a question I asked you this morning that you told them to send an original and 19 copies to the Board and serve on all the parties, and I believe your

[5614]
[Tr. 99]

answer was: "No, I would have been laughed out of the room had I done so."

Is your answer the same to that as it was -- you referred only to oral argument and not to written documents and so forth? A. Oh, no, no, not at all, Mr. Royall, because a Congressman may very well be unable to come down to oral argument. He may have other things that obligate him, obligate his time; he may be sick, and so on. And I take it that is the reason that the Board has permitted the written communications at the same time or in advance of oral argument in place of going down.

Now, I would have explained that to him, I am perfectly sure, and as I think I said to you this morning, if I had told a Congressman in view of the long history of Board practice on this that he couldn't do anything like that, or if I had said, "Rule 14 says you have to do just what parties who are filing briefs do, and in the same way," it would have been a hopeless misinterpretation and misstatement to him of what was permissible and what was done.

Q. To answer my question, did you or did you not state that you explained to these Congressmen and Senators in every case what Rule 14 entailed? A. As I have just outlined to you.

* * * * *

[5617]
[Tr. 102]

Q. I hand you a letter written by Representative Canfield to Mr. Durfee, the then Chairman of the Board, numbered Page 506 in the Joint Appendix. You will note that Mr. Canfield says he understands that American Airlines is requesting the right to fly non-stop between New York and San Francisco and "I believe this company is entitled to an early hearing on the merits of the case."

Did you see Mr. Canfield in regard to getting an expedited hearing or getting a hearing on this matter? A. Well, I can't recall whether I did or not, Mr. Royall, because I can't even place what Mr. Canfield looks like. I can't associate a name with a face.

As I said, I believe I -- I saw Mr. Canfield once, but I can't remember when it was, and I don't remember anything about the conversation.

Q. Did you or did you not make a statement to Mr. Stout and Mr. Hamilton that you thought that you had talked with Canfield in 1957 about the hearing,and that you could have discussed his writing a letter to the Board in support of a hearing to determine the need for a third carrier -- did you or did you not make such a statement?

A. Well, I just don't remember whether I did or not. If that is what Mr. Stout says, then I take his word for it that I did tell him that.

As I say, my recollection of this is very hazy.

Q. Well, that was only several weeks ago, so your recollection between several weeks ago and today should not be too much of a problem. I can understand why it might be over a period of years. If you made the statement several weeks ago, which is the correct one, that one or the one you made here today, that you have no recollection, that you can't remember what the man looks like? A. Well, I can't remember what the man looks like and if he walked into the room I wouldn't know him. I did tell you that I saw him once; I can't remember when that was and I don't remember the details of it.

Now, if when Mr. Stout was talking to me I recollected it a little differently, I can only say to you, as I did this morning, that I can't remember all these details just precisely every time they are gone over. And I remind you that I hadn't even thought about this before Mr. Stout came in to see me.

Q. I understand, but a period of several weeks ago you seemed to recollect, according to the statement of Mr. Stout, that you had urged him to write a letter to the Board urging a hearing on the need for a third carrier. Now, I didn't say it, I am not trying to put words in your mouth. But I want to know which one of those statements, the one you made to Mr. Stout or the one you are making here today, do you want us to accept for this record. A. Mr. Royall, I will give you your option. You take whichever one you want, except that I will object to one thing you say.

Q. I don't think that that is responsive to my question.

EXAMINER STODOLA: Mr. Taylor, we will have to have a little better answer to that question than that. Do you recall talking to Congressman Canfield and urging him to write to the Board? That is the simple question, as I understand it. Is that right?

MR. ROYALL: It is

A. Well, I say I believe I recall talking to Mr. Canfield one time. I do not remember what the details of the conversation were. I did not urge him to write to the Board. He may have asked me whether it would be proper and I would have told him yes, that it would have. But I

did not undertake to urge these people to do things.

Q. Well, my simple question from that is did you or did you not make such a statement to Mr. Stout and Mr. Hamilton? A. I did -- I am -- I am sure I didn't tell him that I urged Mr. Canfield to do something. Now, if Mr. Stout says that I told him that I called on Mr. Canfield and talked about this matter, so be it, I will stand on what he says. He took down careful notes on it and I did not.

Q. Did you see Mr. Robert W. Kean from the Twelfth District of New Jersey? A. I don't recall doing so.

Q. Did you contact Mr. Frank C. Osmers from the Ninth District of New Jersey? A. Yes, I believe I talked briefly with Mr. Osmers in 1957.

Q. Did you talk to him any time other than in 1957? A. Well, I don't recall doing so, Mr. Royall, but I think -- I think I may have dropped by his office one afternoon in 1959 and I didn't even mention the matter, and he -- and he just volunteered, as I recall, that he was writing a letter to the Board about it.

Now, you can check your papers and if it shows

that he wrote a letter in 1959, that might tie in with that. But I don't know whether he did or not. If he did, we didn't discuss it at all.

Q. Mr. Taylor, did you or did you not in talking with Mr. Stout and Mr. Hamilton admit that you had talked to Mr. Osmers both in 1957 and in 1959 concerning the case?

Furthermore, did you state to those gentlemen that in 1957 you asked Mr. Osmers to support the hearing for a third carrier, but that you had never asked any member of Congress to support American as a third carrier, since "Our only objective was to have the Congressman support, first, a hearing to determine a need for a third carrier in 1957, and then in 1959, prior to the oral argument, urge the Board to find a need for a third carrier."

EXAMINER STODOLA: The questions are getting a little long and involved. Suppose we answer the first part first.

(Discussion off the record.)

EXAMINER STODOLA: The answer to that, Mr. Taylor?

THE WITNESS: Well, I can't remember what I told Mr. Stout and Mr. Hamilton.

I object to the use of the word "admit", just

personally, because it connotes something that is not in order. But I have just told you that I think I talked with Mr. Osmers in 1957, and

I seem to recall stopping by his office in 1959 with the -- following the remark on his part that I described to you.

Is that sufficient, Mr. Examiner? Is that responsive?

EXAMINER STODOLA: Well, I believe it is responsive to the first part of the question. What about the second part, now?

(Second part of question read.)

THE WITNESS: Well, I guess that breaks down really into two questions and to answer the second one first, I did not ever ask anybody, as I think I have said elsewhere, to support American, per se. And in 1957 the only purpose in talking with a man such as Mr. Osmers, would have been to inform him of the fact that we had requested a hearing, and inasmuch as it affected his constituency, advise him of it, since it might therefore be of interest to him.

I might add that this is not an unusual practice for American Airlines. We have, on a fair number of occasions, taken it upon ourselves to advise

[5623]
[Tr. 108]

Congressmen and Senators of actions, of pleadings that we are proceeding with before the Civil Aeronautics Board, simply because they are interested. It has been my experience that, when I was more directly responsible with -- for work on the Hill -- that if you don't do this, they are going to ask you about it any way when you come into their office. Frequently, the C.A.B. will advise them of certain steps that are taking place in a case.

It you would like an example, I could say a recent one. Do you want me to go on? Suit yourselves.

BY MR. ROYALL:

Q. Suppose we address ourselves to the question at hand. I believe we are straying very far afield. I don't believe you have yet answered this squarely: Did you tell Mr. Stout and Mr. Hamilton that you asked Osmers to support the hearing for a third carrier? Now, did you or did you not do that, Mr. Taylor? A. I would have to say no, and I think that should be clear by now, Mr. Royall, because unless I misspoke myself this morning, I tried to make it very clear that we almost never go to Capitol Hill and ask a Congressman or a Senator to do something.

We go up and describe the situation to him, and

[5624]
[Tr. 109]

I took you through the various kinds of reactions that you get.

Now, you can get to the point, where a man will say to you, "What would you actually like me to do?" Now, maybe Mr. Osmers did that. If he did, my response at that time -- because I saw nothing wrong with it and couldn't imagine that there was anything wrong with it, and I don't see anything wrong with it today -- would have been to say, "If you think it appropriate to write a letter, that would be fine with us and we would be pleased to see it."

Now, that's different from asking.

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[5626]
[Tr. 110]

A. * * *

Now, I may also have seen Mr. Widnall and discussed with him our request for a hearing in 1957, perhaps I left him a copy of our request for a hearing, I just don't remember. But I think that I -- I think I saw him in 1957.

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[5631]
[Tr. 115]

Q. Did you contact Representative Paul A. Fino, Twenty-Fifth District of New York? A. Yes, I talked with him in 1957, once.

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[5640]
[Tr. 124]

Q. Will you describe the nature of that contact? A. A very brief visit in 1957, advising him of the fact that we were requesting a hearing on this matter.

Q. Did you furnish him any data, copies of the motion to expedite, or any -- A. I may have, Mr. Royall; I do not specifically recall doing so.

Q. I will ask you to look at a letter from Congressman Gwinn on page 510 of the Joint Appendix. In that letter do any of these arguments ring familiar to you

[5641]
[Tr. 125]

as being encompassed in American's motion to expedite and sever the New York non-stop phase from Docket 5903? A. I don't recall what was in that specifically, Mr. Royall, well enough to say that they do. They may correspond with it; I don't know.

Q. Did you furnish any information to Congressman Gwinn? A. I may have supplied him with those papers that we previously referred to. I just don't remember whether I did or not.

Q. The ones that you stated that you may have given to Congressman Fino? A. Correct, sir.

Q. Then these are two Congressmen that you contacted during the pendency of that motion to expedite; isn't that correct? A. Yes, sir.

Q. Did you contact Representative Abraham J. Multer, Thirteenth District of New York? A. Yes.

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[5643]
[Tr. 127]

Q. Mr. John M. Ray, Fifteenth District of New York? A. Yes.

Q. Will you please describe the nature of that? A. In 1957, late one afternoon, I just dropped into Mr. Ray's office, along the lines of the same discussion that we have had previously, at five or five-thirty in the afternoon. I remember the House had adjourned, or at least he was back in his office.

He had never seen me in his life before, and I had never seen him, and I don't know that I have ever seen him since. And I just dropped in and told him about this. The conversation wasn't more than five minutes long, and Mr. Ray didn't ask me anything or tell me anything. He just thanked me and said, "Well, I will -- I am pleased to know about it and I will look into it," or something of that nature.

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[5661]
[Tr. 145]

Q. Did you talk to Senator Clifford Case of New Jersey? A. No.

Q. Or his assistants? A. Yes.

Q. You talked with them about this case? A. Yes, sir.

Q. With whom did you have contact, and what was the nature of those conversations, or what was the nature of that contact? A. I talked with his administrative assistants and at some point one of them asked me whether it would be possible for us to see if we could show them evidence of interest by Senator Case's constituents in this matter, in the form of some letters to him expressing that interest.

And I don't recall that conversation in any great detail. It was a very brief conversation. And I think I told him I didn't know and wasn't sure, but that I would see.

And I believe in 1959 I told his assistants about the fact that oral argument would be forthcoming, and just

[5662]
[Tr. 146]

simply advised them of that and their rights in connection with it.

And the matter was not pursued at all, and I don't believe we discussed it any further.

Q. I refer you to page 497 of the Joint Appendix, purporting to be a joint letter signed by Senators H. Alexander Smith and Clifford P. Case of New Jersey. You will note that letter is dated June 18, 1959, addressed to the Civil Aeronautics Board.

Would you mind reading that, sir?

Did you furnish Senator Case or any of his assistants any information upon which this letter was based or could have been based at that time? A. I don't recall doing so.

It is entirely possible that I might have furnished either a copy of our request for a hearing or the Port of New York authority letter. I would -- I would guess it would have been more likely to have been the latter because that -- that governmental entity is partly operated by New Jersey, it is partly a New Jersey body, as I understand it.

Q. Did you ever contact Senator H. Alexander Smith of New Jersey? A. No.

Q. Anyone in his office, any of his aides, or assistants?

[5663]
[Tr. 147]

A. Mr. Royall, I believe I talked for a good three or four minutes about this with one of his assistants in 1957, but I -- I don't know what we went into; I imagine it would have been just the same very brief description of the fact that we were submitting this request.

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[Tr. 152]

Q. * * *

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[5669]
[Tr. 153]

What publicity were you referring to? A. Well, as you probably know, Mr. Royall, there was a great deal of newspaper coverage of this case in the San Francisco area particularly, and -- San Francisco and the whole bay area, I should say -- and I was only referring to the hope there would be good press coverage of this decision, assuming it was favorable to us, and that interested people in the area would forward it to their Congressmen, or perhaps their Senators, in the role of constituents, if they saw fit to do so.

Q. You said that "The publicity should go to the CAB."

How did you propose getting that to the CAB? A. I don't think I did. It is one reason that -- I suppose I would have liked to have talked it over with these people, and I can't recall that we did talk it over, as a matter of fact.

There were a number of instances where items which were scheduled to be discussed at these little meetings, were never quite gotten around to, and I honestly don't remember that we actually reviewed this.

Q. You were placing this on the agenda with the

[5670]
[Tr. 154]

recommendation that "the full impact of this publicity should go to the CAB," isn't that right? A. Well, I -- it says in the first line, "I suggest that you consider the following for your agenda."

Now, there were many times where things that I would suggest for the agenda just didn't get on it.

If each of six of us suggested five items, that is 30, and these were lucheon meetings, and those were -- you'd never have 30 items right out of hand.

Now, I don't know that this ever got on the agenda but the point I was making a moment ago, was that even if it did, the agenda would only be five or six items long, and we wouldn't always cover the things on it then.

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[5672]
[Tr. 156]

Q. But you were going to get this communication to the Board. Was that going to be through rule 14? A. Oh, I -- I am sure I had no specific thoughts in mind as to just what might be done.

You must remember I was putting this up for discussion.

And I would also call to your attention, for whatever weight you want to give it, Mr. Royall, that in November of 1958 I was still relatively new in the job that I was then in in the Washington office.

Q. You were a vice-president, weren't you? A. No, sir, I was an assistant vice-president, and I had been in that position a little less than five months.

Now, as I say, you give that whatever weight you want to, but I am not so good that I know everything there is to know about that job at the end of five months.

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[5679]
[Tr. 163]

Q. Did the question ever arise between you and Mr. Shipley, in discussions, as to the possible propriety of contacting Congressmen, and what might be the result of that? A. Yes, we reviewed it to reach a decision as to what would be appropriate at that time, there being no case pending, and it being a strictly procedural matter, and there being no intention to discuss the merits, and I did not discuss the merits. We felt that under the circumstances the most appropriate thing that could be done, if a man was sufficiently interested and wanted to do it, would be to write a letter to the Board, because it was completely open, and a matter of public notice to everybody. It never occurred to us that there could be anything the least bit objectionable about that.

Q. Did you report to Mr. Shipley as to the contacts made in this relation; and if so, the results of these contacts? A. No; I couldn't have, Mr. Royall, because I didn't know the results of them. Now, I may have told Mr. Shipley who I saw.

Q. What I mean by the result, if you talk to a man you

[5680]
[Tr. 164]

know you have talked to him. A. That is correct.

Q. If he expresses an opinion or asks a question, the results -- A. To that extent, yes.

Q. You did report to Mr. Shipley? A. To that extent, you are quite right. I thought you meant whether he said he would write a letter, and what he would say in it, and I didn't have any knowledge of that.

Q. Did anyone in American Airlines, particularly your superiors, ever instruct you, or warn you as to the propriety of making Congressional contacts, or civic organizations, or legislators? Was that ever discussed with any of your superiors with you as to how it should be done, and the proper way to proceed in making such contacts? A. Not with my superiors do I recall, Mr. Royall. Very carefully with our counsel.

Q. Would you please define what you mean, to be careful with your counsel? A. I said it was discussed very carefully with our counsel, and with careful attention to the wording of the rules and of the principles of practice, and the practice of the Board over a number of years in construing and interpreting those.

[5681]
[Tr. 165]

Q. Specifically, did Mr. Jacob ever mention to you and Mr. Shipley about any possible difficulties that might arise from communications being engendered or solicited from persons? A. I can't recall specific conversations on that, Mr. Royall. It is possible that Mr. Jacob assured us of what we already knew, that was to be very careful of the understanding and interpretation of the laws, as our counsel explained to us, so we could proceed in a completely proper way.

Q. Did you and Mr. Shipley confer directly with American's counsel, or was it as the result of someone conveying that information to you? A. Directly.

Q. You did it directly? A. Yes.

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[5702]

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[5708]
[Tr. 190]

CROSS EXAMINATION

BY MR. BEVANS:

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[5729]
[Tr. 211]

Q. I want to review for a moment with you, because I didn't quite understand it, your testimony with respect to Senator Case.

I believe you said that in a visit to Senator Case's office you had some conversation with an assistant of Senator Case about travel agents. Now, will you tell us the substance of that? A. Well, I think I covered it as fully yesterday as I can recall it, Mr. Bevans. The conversation was not about travel agents at all.

One of Mr. Case's, or Senator Case's staff people asked me if we could show evidence of interest in American's position by constituents of Senator Case, in the

[5730]
[Tr. 212]

form of some letters to Senator Case, and I don't remember the specific answer I gave, but what it amounted to, I am sure, was that I didn't know, but that I would see.

And then after that I called Mr. Shipley, sometime in 1959, when Mr. Shipley was in New York, and just relayed this request to him, and I don't remember following it up to find out what was done or anything else about it.

Q. In other words, when you sought the support of Senator Case -- and was that through Mr. Zagoria? A. I believe it was Mr. Zagoria.

Q. Mr. Zagoria told you that unless you could show Senator Case that his constituents were in support of your position, that you could not expect his support?

MR. SEEGER: I object, Mr. Examiner. He is trying to put words in the witness' mouth.

MR. BEVANS: The witness can answer the question. It is a perfectly clear question, it seems to me.

EXAMINER STODOLA: Well, I don't think it is a correct paraphrase of the witness' testimony yesterday. Now, if you want to paraphrase it correctly, you may do so, Mr. Bevans.

MR. BEVANS: Let me let the witness paraphrase it again.

BY MR. BEVANS:

Q. Your request to Mr. Zagoria was for the support of Senator Case; is that correct -- the support of Senator Case for American's position? A. No, I wouldn't put it that way, Mr. Bevans. I don't really think we want to spend a lot of time on this, because I said to Mr. Royall --

EXAMINER STODOLA: Well, we are going to spend all the time necessary.

THE WITNESS: All right, sure. Well, I understand that. I am sorry, Mr. Examiner. But this is a point that Mr. Royall and I talked about at great length yesterday. I told Mr. Zagoria about the status of the case in 1959 and what he could do if he wished in connection with the oral argument. Now that is not the same as specifically going to him and saying, "May we have your support? Will you please come to oral argument," et cetera, which was not what I said to him.

Now, then, I think --

Q. You reached the same result, though, did you not, Mr. Taylor? A. Oh, I would have been happy if Senator Case had come to oral argument.

Q. That is why you went there in the first place, isn't it, what you asked him directly or whether you did

is not very important, but that is why you went there; isn't that correct, Mr. Taylor? A. To the extent that I would have been happy if he came to oral argument, but I would not have been unhappy if he didn't, Mr. Bevans. I think you are trying to suggest that this was an all-out issue, that I really was living and dying on the question of whether Senator Case came to oral argument, and that just simply isn't the fact.

Q. What we were addressing ourselves to, Mr. Taylor, was the context of this request of Mr. Zagoria for expressions of support from Senator Case's constituents. Now, can you tell me what Mr. Zagoria said to you in that connection? A. I already have, to the best of my ability, and I think what you then asked me was whether he made it clear that Senator Case would have no interest in it unless such constituents expressed themselves, and that is not the fact.

Q. What was the context of his request that you get some -- A. Just as I have told you, it was an extremely brief conversation, Mr. Bevans. It couldn't have been over four or five minutes long, and it was not pursued. I did not talk with Mr. Zagoria about it again so far as I can remember.

Q. Mr. Zagoria said what? Did he say, "If you

[5733]
[Tr. 215]

want Senator Case's support you had better get some expressions from his constituents"? Or did he say, "Why don't you get in some expressions from his constituents and then Senator Case can think about it?" What was the exact context of that conversation? A. He didn't say either one of those things. I have told you, to the best of my ability, what it was he said --

EXAMINER STODOLA: Apparently Mr. Bevans hasn't heard or hasn't understood. Will you repeat briefly what he said?

THE WITNESS: Surely. As far as I can recall, after I had merely explained to him that oral argument would be forthcoming, and the nature of the case, he just said, "Could you show us any interest in this matter by constituents of Senator Case in the form of letters to Senator Case?" And I don't recall that there was any more to it than that, Mr. Bevans.

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[5788]
[Tr. 269]

CHARLES L. STRICKLER

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYALL:

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[5813]
[Tr. 294]

Q. Now I will ask you if you contacted the Alameda Chamber of Commerce? A. I believe that I did.

Q. Would you please explain what contact you had with that Chamber? A. Subsequent to the filing of the City and County of San Francisco answer, and motion to the same effect requesting immediate hearing to determine the need for a third San Francisco-New York Non-Stop Carrier, I called on the Alameda Chamber of Commerce to urge them to adopt a resolution supporting the position of the City and County of San Francisco.

This I believe was done.

Q. Do you know, or can you recall about what time this contact took place? A. Well, I believe the -- the answer and the motion of the City and County of San Francisco was filed on May 7th, 1957.

I am guessing, but I strongly suspect that my visit to the Alameda Chamber was within a week or two following that day.

Q. What if anything did you request that the Chamber of Commerce of Alameda do in relation to American's motion and San Francisco's answer? A. Well, in the -- the first place, Mr. Royall - I

[5814]
[Tr. 295]

want you to clearly understand that the contact I made with the Alameda Chamber of Commerce was to urge them to support the position of the City and County of San Francisco, it was not to do anything on behalf of American Airlines.

And what I urged them to do was to adopt a resolution supporting the position of the City and County of San Francisco in their request for a hearing on the San Francisco Non-Stop matter.

Q. At that time was the City and County of the City and County of San Francisco aware that you were engaging in such activities in gaining support for its answer? A. I am fairly certain that they were.

Q. Well, do you know, or don't you know? Can you state positively? A. Well, I am reasonably sure, Mr. Royall, but again, this is three years ago, and I am unwilling to rely on my memory.

Q. What if anything did you state to the chairman or any official in that chamber as to what they should do with such a resolution, were it passed? A. I believe that I suggested that they file a copy of this resolution with the City and County of San Francisco, indicating their support of their position.

I am not certain of this, but I suspect I suggested that

[5815]
[Tr. 296]

they file a copy of it with the San Francisco Chamber of Commerce.

I may have, but I am not at all certain, suggested that they file a copy also with the Oakland Port Authority, and the Oakland Chamber of Commerce.

I believe, further, that I suggested that they submit a copy to their local Congressmen. And I believe that all interested parties -- I just am not clear beyond that.

Q. Did you suggest that they transmit a copy of such resolution to the Civil Aeronautics Board or any members thereof? A. I didn't mean to omit the Civil Aeronautics Board. I am fairly certain I did, yes.

Q. Did you on that occasion tell the Chamber of Commerce of Alameda in what manner the filing was to be made with the Civil Aeronautics Board? A. I don't -- I don't know what you mean, Mr. Royall, by "in what manner".

Q. As to how it was to be transmitted and when it was to be transmitted, in what form it was to be expressed? A. Well, the form, I took it to be the standard resolution that the Alameda Chamber used. It was to be relayed through the mails.

Q. Did you mention to them any procedural -- Board procedural rules that they were to follow in making a filing

[5816]
[Tr. 297]

with the Board? A. I am not clear as to whether that was discussed or not. I just don't know.

Q. Did you suggest to the Chamber of Commerce of Alameda that they forward things to their Congressmen with a view to getting their Congressmen to support the City of San Francisco in its effort to get the case set down for hearing?

[5817]
[Tr. 298]

A. I don't believe I suggested a letter of transmittal, if that is what you mean by the chamber to their Congressman, but I would --

Q. Go ahead. A. -- be candid with you and say that it was my hope that this would help convince the local Congressman of the vital importance of this matter to the Bay area.

Q. Did you furnish the Chamber of Commerce of Alameda any draft of a resolution which you desired that they might pass, or assist them in the preparation of such resolution? A. I am sure -- reasonably sure that I made some suggestions to them as to what should be contained in their resolution, but I am not certain whether I gave them a draft. I don't believe that I did give them a draft of a resolution.

Q. As related to the Alameda resolution and your contract with them, was Mr. Jacob or Mr. Shipley apprised that you had made this contact? A. I am not sure that they were.

Q. Was the resolution passed while you were present or there at Alameda, or was it sometime later? A. Sometime later.

Q. Were you apprised of the fact that it was passed, and if so, how? A. Well, I was advised after it had been passed. How I was advised I just don't recall.

[5818]
[Tr. 299]

Q. I will ask you whether or not you contacted the Oakland Chamber of Commerce. And in that again I refer to the dates, the time prior to the motion when you were first given your instructions by Mr. Jacob and Mr. Shipley, and up until the Board's order setting the case down for hearing and assigning it Docket 9214. The Oakland Chamber of Commerce? A. Yes, I did.

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[5822]
[Tr. 303]

MR. ROYALL: Mr. C.R. Smith.

Whereupon,

C.R. SMITH

called as a witness, having been first duly sworn, was examined and testified as follows:

EXAMINER STODOLA: You may proceed, sir.

DIRECT EXAMINATION

BY MR. ROYALL:

Q. I believe that your name is C.R. Smith, and that you are president of American Airlines, Mr. Smith? A. Right.

Q. And I believe you were president of American Airlines during the dates of January 1, 1957 until the present? A. That's correct.

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[5826]
[Tr. 307]

Q. Mr. Smith, is that newspaper report an accurate statement as to statements made by you at that time? A. That may or may not be. I think it might be interesting to know the background of the meeting which preceded the statement attributed to me there.

We had some information from Boeing that they were doing somewhat better on the 707 than they had earlier anticipated, and they might be able to deliver the airplane somewhat earlier.

That of course affected our plans and plans for service to some of these communities, and I went out to Boeing and spent part of four days there, first to visit the plant, and secondly to inspect the airplane, and third, to get up to date information on production schedule and delivery schedule.

We were trying to keep the communities informed about the progress on the airplane, not only San Francisco, but Los Angeles, Chicago and New York, and the rest of the cities where we intended to operate the airplane.

And I thought it would be well while I was in San Francisco to talk with some of the people there and bring them up to date about Boeing progress on the airplane and our plans for service.

So before I went to Seattle I asked our San Francisco city manager

[5827]
[Tr. 308]

Mr. Startup, to see if he couldn't arrange a luncheon on November 4, I guess it was. And I suggested he ask some of the businessmen, some of the bankers and some of the people from the city organization, perhaps the airport manager, perhaps somebody from the city administration, and, if he wanted to, members of the press.

And this luncheon was set up for November 4th. I got to San Francisco on November 2nd, I believe, and spent the rest of that day and the next day inspecting our own facilities there at the airport and the ticket offices and the reservations offices.

We had the luncheon on November 4th at the Bohemian Club. I don't remember the time -- the usual luncheon time.

I guess there were about a total of 30 guests there.

It wasn't a very long meeting, I guess we were there an hour and a half, including the luncheon.

At the conclusion of the luncheon I took the opportunity to tell them something about the airplane and about some of our plans for service.

Of course then jet airplanes were somewhat newer than they are now, and people had a lot of questions about speeds and carrying capacity and costs and lot of other things that are pretty conventional now.

I devoted most of my time to the discussion of the attributes of the airplane. Now, I also said I had been up

[5828]
[Tr. 309]

to the Boeing factory, and I had inspected the airplane, I thought it had turned out quite well, that we were very much encouraged by some early deliveries, and perhaps we could start service earlier than we had anticipated before.

You have of course a very competitive situation between San Francisco and Los Angeles, like you do between other cities in the country, but especially marked there, and there had been long a desire on the part of both San Francisco and Los Angeles to have the first trans-continental jet service.

We had planned pretty consistently to put the first jet service out of Los Angeles, and I felt some obligation to explain to the people of San Francisco why that was so. I told them of course that the jet airplane was basically a long-range airplane, it was best suited for that service, it could do it best in that service, and we had non-stop privileges between Los Angles and New York, and we intended to start the first schedule there.

I explained to them the complexity of our route between San Francisco and Chicago and New York, and that is not always easy to explain to people who are not -- know nothing about certificates, because I think the usual person thinks that when three people have a certificate on the routes, their rights are probably about equal.

But I tried to explain to them that while United and TWA

could operate non-stop between San Francisco and New York, we didn't have the privilege of doing that, and therefore Los Angeles would obviously get non-stop service to New York, so far as American was concerned, first, unless that situation was later remedied.

I said, however, that we had very definite plans to operate a service from San Francisco to Chicago to New York, and that would come sometime soon after the Los Angeles service started.

The meeting was concluded about that time. There was no recommendation, no request or no suggestion that anybody in the group do anything about the situation.

We told them what our problem was, and we said that we were going to try to have a hearing before the Board, to see if the situation couldn't be rememdied; we hoped that we would get a hearing, and we hoped that we'd have a favorable decision. But we suggested nothing for any of them to do.

After the meeting and after most of the people had gone, one of the reporters came up and said, "What do you think San Francisco could do to aid?"

And I said, "Well, you were here during the time that I was talking, and the principal thing we seek is a chance to get heard on this matter, and anything that San Francisco can do to see that we get a hearing on the subject would be very helpful, I'm sure. And I hope we have a hearing, and

I hope it turns out well. We are adequately prepared to operate a non-stop service, if it is permitted."

So far as that specific language is concerned, maybe I said that and maybe I didn't. I don't know.

But that might have been my specific language, and it might have been the reporter's interpretation of the language.

But I have related the intent of the conversation the best I can, and I think it is a fair story about the meeting and the talk with the reporter.

Q. Did you or did you not inform the group that "' a decision on whether a hearing will be granted is due December 1,' Smith said." Did you so inform the group at the luncheon, or the member of the press subsequent to the luncheon, Mr. Smith? A. That I don't remember. I don't know whether I gave him the specific date or not.

I am sure that I indicated that we expected a decision sometime soon, but I don't know whether I knew anything about the date at that time or not.

Q. Was there any official meeting with the press, did you have any official meeting, a meeting with the press, other than the one that you detailed -- A. No.

Q. -- just subsequent to the lunch? A. That was all.

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[5837]
[Tr. 318]

CROSS-EXAMINATION

BY MR. BEVANS:

Q. Mr. Smith, was your visit to San Francisco on November 2nd through the 4th, which as I understand it, was a continuation of a trip you made to Seattle to the Boeing plant, and then you went to San Francisco on the return, on your way back to New York, was that stop at San Francisco, and the meeting that you held suggested to you by any other person in American, or was that your own idea? A. Oh, it could have been, it could not have been. There was nothing especially significant about the meeting in San Francisco.

We felt a general obligation to keep all of these communities informed.

We had meetings in Los Angeles, we had meetings in San Francisco, we had meetings in New York, we had meetings everywhere. Dallas.

We were trying to -- we were trying to keep these communities up to date on -- on the advancement of the jet age. They were very much interested.

The situation was changing quite rapidly.

As a matter of fact, we advanced the starting date by

[5838]
[Tr. 319]

some months just prior to the time I went to San Francisco.

It was nothing unusual, I wouldn't need any suggestion to -- we do that as a conventional part of our business, on all meetings of importance affecting the communities, at least we try to.

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[5841]
[Tr. 322]

CROSS EXAMINATION

BY MR. RETT:

Q. Mr. Smith, you stated several times that "we," had meetings, similar meetings with Los Angeles, Dallas, et cetera.

Now, I would like to ask you, in referring to "we," did you personally have meetings with specific representatives in Los Angeles, Dallas, Chicago, et cetera, in late 1957 regarding the progress of American's jet service, or did you mean other people in the American organization? A. Well, when I say "we," I mean to say people who work with American Airlines.

I don't have any specific dates. I know that I had one or two meetings in Los Angeles personally. I don't -- I don't know whether it was before or after November 1957.

But we had a continuing project to have someone from the company visit these different towns and tell them how the jet program was coming along, and various people for the

[5842]
[Tr. 323]

company did it, participated in it.

Sometimes I did, sometimes someone else did.

But there was intense interest in the first jets to be operated in the transcontinental service, and we had a great many questions about them:

"What kind of airplane is it, how fast is it, how many people does it carry, when are you going to have it in our town, are our runways long enough, do we have to do any improvements to the airport?"

We had a joint obligation with a lot of communities to keep up to date on the requirements, and I think we did a fairly good job on it.

Q. I appreciate that.

I agree with you on that, but my question was just directed to this, Mr. Smith: Whether you participated in those more often or whether they were generally or more frequently carried on by other representatives of American Airlines without you? A. Oh, I would -- this is a sheer guess: I guess I did 15 or 20 per cent of them, and I guess someone else did 80 to 85 per cent of them.

Q. Just one question, Mr. Smith: This question and answer period of the members of the press on November 4th, this November date in San Francisco, was that question and answer period at the conclusion of the luncheon, but in

the presence of all the guests that had been invited? A. No, as I remember this specific reporter, he came up to me after luncheon and after most of the guests had gone.

Q. And it was a separate press conference that you had then? A. It wasn't a press conference at all. I was still there, I was host, and he came up to me and said, "You made an interesting presentation What can San Francisco do to be of aid?

Q. You don't recall who else was there at that time, I assume, Mr. Smith -- that is some time ago? At the time this reporter came up to you? A. Who was -- who was remaining in the room?

Q. Yes. A. No, no, I don't. I guess half the people had gone.

MR. RETT: That is all I have. Thank you.

* * * * *

[5844]
[Tr. 325]

CHARLES STRICKLER

resumed the stand and testified further as follows:

DIRECT EXAMINATION (CONTINUED)

BY MR. ROYALL:

* * * * *

[5850]
[Tr. 331]

Q. Was there any reason why you did not contact them personally? Some of these were right in the immediate area, were they not? San Francisco? A. I believe some of them were. The reason I didn't was very simple. I had too many other things to do in this period of time.

[5851]
[Tr. 332]

Q. Did you or did you not state to Mr. Stout and Mr. Hamilton when they talked to you in response to a question as to why you didn't talk to these Chambers of Commerce, "It was my understanding that others would talk to at least some of the other Chambers of Commerce which you just mentioned." Did you or did you not make that statement? A. I believe I did.

EXAMINER STODOLA: You mean other than American? Is that implied there?

THE WITNESS: Yes, and Mr. Examiner, it was my understanding, belief at the time that the resolution, I believe, of the City of San Francisco, was to be sent to these various chambers of commerce, and I was also under the impression that the resolution of the Chamber of Commerce of San Francisco was also to be sent to these outlying, surrounding Chambers of Commerce.

Q. Did you instruct or suggest that any other personnel from American Air Lines contact Chambers of Commerce in San Francisco, the San Francisco Bay Area, other than the ones that you personally have stated that you contacted? A. Yes, I did.

Q. Could you name some of those and the persons whom you instructed to contact them? A. The names of the Chambers of Commerce I feel sure are included in the list that you mentioned previously, although I cannot be certain that every one of those was included. The people at American Air Lines whom I requested to contact these Chambers include the Sales Manager at the time, who I believe was Mr. Startup, and a few of his zone sales managers.

Q. Do you recall who some of those zone sales managers were during the period January 1, 1957 to January 13, 1958? A. I can give you the names of the zone sales manager, but I can't be certain whether or not all of them were instructed to contact any of these Chambers of Commerce. Now, Mr. Jack Watkins is the Sales --

Q. Would you limit your answer to the ones whom you instructed to contact these Chambers? A. To the best of my memory, yes, I will. I believe that Mr. Jack Watkins of Oakland area was there, and Mr. Jack Brennen of the Peninsula area was there.

Q. What were your instructions to these people that you have just mentioned, Mr. Startup and the two zone managers, as to what they should attempt to do and as to how they should attempt to accomplish whatever you were directed to do? Would you please explain that? A. Certainly. As best I can recall, the whole matter was reviewed with these individuals starting with our motion, including the answer of the City and County of San Francisco, and I am reasonably certain that the Chamber of

[5853]
[Tr. 334]

Commerce had at that time adopted a resolution supporting the position of the City and County of San Francisco, and I asked them to contact certain of the smaller Chambers of Commerce in the area surrounding the Bay area, asking them to adopt a resolution supporting the position of the City and County of San Francisco, and possibly included in that was the position of the Chamber of Commerce of San Francisco.

Q. Did you instruct these personnel as to what disposition, if any, was to be made of such resolutions, were they passed by the Chamber of Commerce of the City or town that they were to contact? A. Well, included in those instructions certainly would have been a request to send a copy of any resolution adopted to the City attorney's office of San Francisco, I would believe to the Chamber of Commerce of San Francisco, to their local congressman, I believe the Civil Aeronautics Board, and other interested parties.

Q. Could you tell the Chambers they were instructed, these gentlemen were instructed to contact by name? A. I can't give you a complete list, Mr. Royall. I am not that familiar with it at this point.

Q. Could you give us an estimate of the number of Chambers that would have been involved in your requests to these gentlemen, that is, the number of Chambers in the San Francisco Bay area?

[5854]
[Tr. 335]

A. Well, the way it was determined, I am reasonably certain was that we listed the Chambers of Commerce in the area known to our salespeople. Now, just guessing, I would say it would be under ten, although it well may have exceeded that number. I can't be certain.

Q. Were your salesmen given any direction in regard to contacting City officials or civic organizations within the same area, encompassed by those Chambers of Commerce? A. Other than the City and County of San Francisco and the City of Oakland?

Q. Yes, other than those. A. The only other I can think of is San Jose.

Q. As I understand your answer then, your directions to Mr. Startup and the other two zone managers were to limit themselves to Chambers of Commerce in the Bay area, is that correct, or is that incorrect? A. Well, as I say, I think that I asked that they contact San Jose as well.

Q. But that would be the only City that you recall having directed, that you directed them to contact outside of the Chambers of Commerce? A. That is the only one I can recall.

* * * * *

[5883]

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[5886]
[Tr. 365]

Whereupon,

CHARLES L. STRICKLER

resumed the stand, and testified further as follows:

[5887]
[Tr. 366]

DIRECT EXAMINATION (CONTINUED)

BY MR. ROYALL:

* * * * *

[5907]
[Tr. 386]

Q. Mr. Strickler, could you detail to us the extent of your cooperation with the City Attorney's office in the preparation of the evidentiary matters brought out in the hearing in San Francisco, and I believe in the sessions in Washington?

EXAMINER STODOLA: Speak a little louder, please, Mr. Strickler. They can't hear you.

Q. Yes.

[5908]
[Tr. 387]

A. From the very beginning, that is, from my initial contacts with people in San Francisco, I made it abundantly clear to the City Attorney's office that I was available to render any assistance that I could in the preparation of their case; not only -- I go back actually before the preparation of their evidentiary case, but any aid that I might be in filing their answer and motion in support of an expedited proceeding.

I worked very closely with the City Attorney's office. I had many discussions with that office.

I would make suggestions to the City Attorney. He would make requests of me. I would try to fulfill those requests.

We would discuss the requests that we made, in very great detail. And I suppose in substance I gave him every assistance that I could, and he wanted.

Q. Were you aware that the City Attorney's office was forwarding resolutions to the various civic bodies, chambers of commerce in the San Francisco Bay area? Were you aware of that fact, sir? A. Yes, the City Attorney's office and I sure discussed that.

Q. Did you in any way coordinate -- A. And may I add, I believe this can be checked by the City Attorney's office, but it is my recollection, as I

[5909]
[Tr. 388]

am trying in my mind to review the resolution, that it states in their resolution, or resolution of the PUC, to whom copies of that would be sent.

Now, maybe I am wrong, but that is the recollection I have of their resolution, but in addition to that, as I stated, the City Attorney's office and I had conversations about this.

Q. Did you coordinate your activities in support of American's motion and San Francisco's, and motion thereto, with the City Attorney's office? A. I was very much aware of the content of American's motion for an expedited hearing.

I helped prepare that motion with our lawyers and I helped develop some of the economic arguments contained therein.

I coordinated as best I could that filing with the filing of the City and County of San Francisco. I advised them as to what our motion was going to contain and in order to make their answer the most effective answer which they could file, I tried to eliminate any duplications as much as I could, and made suggestions some of which were accepted, some of which were not, for incorporation in their answer.

I did coordinate our efforts in that regard.

Q. Subsequent to the filing of American's motion on May 3, 1957, and San Francisco's answering motion

[5910]
[Tr. 389]

in response thereto, did you continue your coordination with the City and County of San Francisco, in relation to those, the motion and answer and motion? A. I believe there was only a four-day interval between our motion and their answer but I would answer maybe to save some questions, I coordinate very closely American's evidentiary case with the evidentiary case of San Francisco, the Camber Oakland, throughout this entire proceeding.

Q. Very good, Mr. Strickler.

* * * * *

[5920]
[Tr. 399]

Q. Did you appear before the full Commission, or what is it? A. Well, as I stated from the beginning, Mr. Examiner, I had a visit first of all with the president of the PUC and the airport manager, at which time it was discussed how and who was to proceed in requesting a hearing.

From that point I had visits with individual members of the PUC, other than Mr. Martin. Now I don't recall at this point whether it was before or after May 3rd, the date on which we filed our motion, but I suspect that it was prior to that time, but as I stated also, it is necessary before the City and County of San Francisco can participate in a matter before the Civil Aeronautics Board, it must receive authority and instructions from the Public Utilities Commission and I believe in the form of a resolution.

Now since the PUC had this interest in this matter, it requested that the parties concerned appear before the full commission on a certain date to argue pro and con the question of whether or not the PUC should adopt a resolution directing the City Attorney's office to support the need for hearing.

Now this date was set -- and I assume the other carriers did as I did, prepared their arguments to advance to

[5921]
[Tr. 400]

the PUC; they called on us. I believe I appeared first; I got up before the PUC, the five members of this commission, and explained to them why, in our opinion, they should support the need for a hearing. I believe Mr. --

Q. At that moment you were arguing only the need for a hearing? A. The need for a hearing, yes, sir, not whether or not they should support American Airlines, simply the need for a hearing.

Q. Proceed. A. There was a representative from both TWA and United present.

Q. Who were they? Do you know?

MR. NEEDLES: Mr. William Hanley represented TWA.

EXAMINER STODOLA: Who?

MR. NEEDLES: William Hanley.

EXAMINER STODOLA: How do you spell his name?

MR. NEEDLES: H-a-n-l-e-y.

BY MR. ROYALL:

Q. Do you know who represented United? A. Mr. Warren Burke represented United, and they presented their arguments as to why the PUC should not adopt a resolution supporting the need for a hearing.

After those arguments in the absence of the carrier representatives they took a vote, and I believe it was a unanimous vote to urge the need for a hearing.

* * * * *

[5927]
[Tr. 406]

EXAMINER STODOLA: Mr. Royall, you may proceed. Before you proceed, sir, I meant to ask one further question, as to whether you had any further appearences before any other group in the Bay area besides the PUC, of the nature that you had before the full PUC.

THE WITNESS: Yes, there were appearances made before the San Francisco Chamber of Commerce; the aviation committee of the San Francisco Chamber of Commerce called a meeting requesting a representative of the various carriers concerned in this matter to appear.

Again I represented American Airlines and gave a

[5928]
[Tr. 407]

presentation as to why the Chamber of Commerce should adopt a resolution supporting the need for a hearing. Also, Mr. Warren Burke of United appeared and made arguments in opposition to it.

I don't recall the gentleman's name from TWA, but I do recall there was a representative from TWA present. I think it was significant that Southwest Airlines, now Pacific Airlines, also appeared there and made arguments in opposition to the adoption of the resolution by the Chamber of Commerce in support of a need for hearing.

This meeting followed the meeting of the PUC. It was after they had adopted their resolution, and I recall that Mr. Frank Needles was there from the office of the City Attorney of San Francisco, and he urged them to adopt the resolution, I believe in support of the City and County, which was in support itself of the need for a hearing.

Again, as I recall, the representatives of the carriers were excused from the room, at least I was, I am not sure about the other carrier representatives, at which time a vote was taken and this resolution was adopted by the very narrow margin of 10-to-8 in support of a resolution urging the need for a hearing.

EXAMINER STODOLA: Were there any similar appearances before any other Chambers of Commerce or any other cities in the Bay area?

[5929]
[Tr. 408]

THE WITNESS: To my knowledge there were no other collective meetings. As we know now, I did appear before the Alameda Chamber of Commerce. I did not appear as such before them, but I had a visit with certain members of the Alameda Chamber of Commerce.

I also was aware there had been visits from the other air carriers to the others, the Chambers of Commerce. I was not present at the time, nor were there meetings called by these Chambers of Commerce to hear all of the carriers at the same time.

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[6058]

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[6091]
[Tr. 567]

Whereupon,

ROBERT S. SMITH

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYALL:

Q. I believe your name is Robert S. Smith, and you are employed by American Airlines, is that correct? A. That is right, yes.

Q. Were you employed by American Airlines--or have you been employed by American Airlines from January, 1957 to the present time? A. Yes.

Q. Will you please state in what capacity -- capacity or capacities -- you have been employed by that airline since January 1, 1957? A. In 1957 I was manager -- we call it zone manager -- of New Jersey, zone or district.

And in 1958 I was moved into New York as Metropolitan sales manager, which capacity -- in which capacity I was in charge of all direct sales of the New York District, which encompassed New Jersey, New York, Long Island, Westchester.

Q. Do you know the approximate date in 1958 at which you moved into the position of Metropolitan sales manager in New York City?

[6092]
[Tr. 568]

A. This would be -- well, let us see. It would be the latter part of 1958, probably around October, as I remember.

Q. Mr. Smith, were you aware in 1957 or in 1958 of American's application on file with the Civil Aeronautics Board requesting non-stop authority between New York and San Francisco? A. Yes.

Q. Were you present during the year 1957 and 1958 when that case or that application of American's was discussed by any personnel of American Airlines? A. Not that I know of, no.

Q. Were you present at any meeting in the summer or early fall of 1958, when this case came up for discussion? A. Not this case specifically. We had regional sales meetings, and in that -- we had a little different organization in those days than we do now.

And we had regional sales meetings, in which our -- a discussion -- we had visiting people from other departments who attended our meetings, flight, legal and so on. And just general discussion of various routes, and what the legal department did, more or less as general information.

That is the only thing I can think of where it might have been mentioned.

[6093]
[Tr. 569]

Q. Specifically did Mr. Dwight Taylor ever discuss the American application in this market, the New York-San Francisco -- A. Well, Dwight Taylor --

MR. SEEGER: Excuse me, are we talking of the same time, now?

Q. Yes, I am talking in about 1958, at any time did Mr. Dwight Taylor discuss this particular case with you? A. Well, Mr. Dwight Taylor was the person who gave us a talk at our meeting.

But specifically discussing only -- at the meeting discussing the general San Francisco and other cases which we had, but no specific discussion in this case per se.

Q. Was this case mentioned by Mr. Taylor at such a meeting? A. I would think probably it was, yes.

Q. Well, now, you can answer:

Do you know, or don't you, Mr. Smith, now? We are not after probabilities, either you know or don't you? A. No, I know that. I know that.

Q. Did Mr. Taylor discuss it in your presence, or was it brought up by another party at such sales meeting? A. I would think this might have been discussed. You are saying I can't discuss probabilities, and I am trying to go back and reconstruct in my mind just exactly what was brought up this night.

Q. I want you to take as much time as it is necessary to deliberate, I don't want to rush you into an answer or get you to say something you are not certain of.

I want you as nearly as you can to give us a precise answer, if it is possible. A. I can't recall what was discussed at that meeting. I know that rates -- or that routes were discussed, and rates were discussed, but whether this specific -- I am sure the San Francisco thing was mentioned, along with the general background of his department, what it did. That is what -- that actually is what the discussion was on.

Q. Then the New York-San Francisco Non-Stop application of American was discussed, isn't that right, Mr. Smith, by Mr. Taylor? A. So far as I can recall, it was brought up.

Q. Is that your recollection today, that it was brought up? A. That is right.

Q. Can you pinpoint the approximate date of that meeting to which you have just referred, where Mr. Dwight Taylor brought up the subject of New York-San Francisco

[6095]
[Tr. 571]

Non-Stop? A. I would expect probably this was some time in May or June. Probably.

Q. What year, sir? A. Well, I would again think 1958.

That can be checked, the meeting we had down there -- I suspect it is on record, when these various meetings were held.

Q. Was the New York-San Francisco case discussed at more than one meeting, and if so, would you detail those meetings? A. No.

Q. Just one meeting? A. Just as far as I know, any meeting that I attended, and then it would not be a discussion of the San Francisco case, it was just in the general operation of that department.

That is the only meeting I attended that we had a representative from Mr. Taylor's department.

Q. During that particular conference or immediately thereafter, did you make any suggestions or discuss with Mr. Taylor any possible activity on your part or the part of any sales representatives in relation to that case? A. Yes.

[6096]
[Tr. 572]

Q. Would you please -- excuse me, go ahead. A. Yes.

I discussed with Mr. Taylor, and I would like to clarify this point: I don't know whether it was immediately after this meeting I happened to be down in Washington for another meeting, having nothing to do with this -- it was a Chamber of Commerce which I also talked with Dwight about the reaction of some of the accounts in the area in so far as the --

their interest and their difficulty in getting San Francisco space, and many of these people had expressed to me that they were interested in another carrier going into the San Francisco area as a non-stop.

Q. Was the subject discussed by you or Mr. Taylor as to the activity or possible activity of participation or support, of travel agents in the New York Metropolitan area or New Jersey area in this case? A. No, not travel agents along, general -- general customer participation.

We had several companies that were interested. We didn't limit any of our discussion -- in fact I don't know if it came up about travel agents, per se, but customers, both our -- our -- which are travel agents and commercial accounts, as we refer to them.

And we did have --

Q. Were travel agents mentioned as possible contacts by you or Mr. Taylor during that discussion? A. They could have been, as customers. But this I can't -- I was talking about -- talking any time I discussed this, that general approach was on customers; and travel agents of course are our customers.

Q. Mr. Smith, do you recall several weeks ago an interview had between you and Mr. Robert Rickey of the CAB's investigative staff in relation to this case, here in New York? A. Well, not several weeks ago, I think this was just about a week ago.

Q. A very short time ago? A. Yes.

Q. And Mr. Rickey was talking to you about your activity in this case, if any, isn't that right? A. That is right.

Q. On that occasion, did you or did you not state that you attended a quarterly meeting of American's eastern regional sales managers which was held in Washington, D.C., during the summer or early fall of 1958 -- did you or didn't you make that statement to Mr. Rickey? A. I did.

Q. Furthermore, in that same conversation with Mr. Rickey did you or didn't you make this further statement:

[6098]
[Tr. 574]

"At this meeting Mr. Dwight Taylor talked to the group about American's pending route cases and a variety of subjects. During the meeting you stated -- you suggested to Mr. Taylor that it might be of assistance to American in the New York-San Francisco Non-Stop Case to contact travel agents to determine whether they felt additional San Francisco-New York Non-Stop service as needed, and if so, have them write their Congressmen urging them to appear in an oral argument in behalf of American."

Did you or did you not make such a statement? A. No, not to my knowledge, on travel agents. This was general customers.

If I -- I am sure if I said travel agents, if you have that in your record, it was general customers.

We never at any time intended this to be concentrated at travel agents.

Q. I am not asking you what the intention was, I am asking you if you made a statement like that to Mr. Rickey? A. I don't remember making a statement about travel agents. I remember making a statement about customers.

At the -- at that state of the game I think we were checking in the agency section, on the files.

Q. Did you make the remaining part of that statement,

[6099]
[Tr. 575]

with that one exception, that you did not specifically mention travel agents? A. Could I have that statement again?

(Last question read.)

THE WITNESS: No.

MR. SEEGER: May I interrupt you for just a moment now.

Was your statement that the enforcement investigator's notes show this was a regional meeting?

I don't understand this, I am confused by the time here.

MR. ROYALL: I merely asked him if he was talking about -- do you wish that I repeat --

MR. SEEGER: I would just like to know what dates we are talking about. I seem to have lost track of that.

MR. ROYALL: The statement which I asked him to be made, that was with respect to American's Eastern Regional sales managers meeting, which was held in Washington, D.C., during the summer or early fall of 1958.

Summer or early fall of 1958.

THE WITNESS: In the statement as read back to me you said: "During the meeting."

No, I didn't do this during the meeting. I discussed with Dwight after the meeting, Dwight Taylor.

And as I said before, I am not clear as to whether it was

after this meeting or subsequently, when I was in Washington, and saw it, when I was attending a Chamber of Commerce meeting down there for the State of New Jersey.

But I did discuss this with Dwight, but not specifically -- nothing, as I remember, applying to travel agents as such.

Customers, but not travel agents.

Q. Did you at the sales meeting or at a later time in Washington, at the -- A. This would be a Chamber --

Q. -- or at the Chamber of Commerce meeting subsequent to that regional sales meeting, make a suggestion to Mr. Taylor relating to contacting to individuals or accounts in the New York area with a view to having them write their Congressmen urging them to appear in oral argument on behalf of American? A. Well, let me put it this way: When you say "suggest," this was in a general conversation, not at a meeting, when I was talking with Dwight.

And I, as I remember, in discussing this thing said there were a lot of people, a lot of our customers who were interested in additional -- in additional service. I had talked, in discussing with Dwight, about the fact there were customers in general who were interested in more service in San Francisco, because of the fact that they were not able to get space, or for some other reason,

and that these customers might be interested in this case.

Q. Now, you have made quite a long statement there, Mr. Smith, but my query is: Did you suggest to Mr. Taylor or did he direct you to see if customers in the New York area might be induced or requested to write letters to their Congressmen, urging them to appear at the oral argument in favor of American? A. No, not at that -- that is the -- at a later time I was contacted, not by Dwight at this stage of the game, but by Morris Shipley, to contact customers again -- which we did -- who would be interested and do this one -- when we made our routine calls, to write their Congressmen to appear at the oral hearing.

Q. In other words, when did Mr. Morris Shipley tell you to have your sales representatives, or you or your sales representatives, go ahead with this project of eliciting such support from customers? A. That was some time in -- this was some time in the spring of 1959.

I would say probably about the latter part of -- I don't know, the latter part of March, the early part of April.

Q. 1959? A. This was in '59, because I was definitely in New York,

and I had moved into a new home.

So this is --

Q. What was the date of this Chamber of Commerce meeting, when you -- A. This came up once a year, to answer your question.

This was the state -- New Jersey State Chamber of Commerce dinner for the Congressmen and Senators, and it was different dates --

Q. Do you know what date it was held in 1958? A. No. I am trying to go back and reconstruct when this was held in 1958.

Q. What city was that held in? A. It was held in Washington, held in Washington. And the dinner was at the Mayflower Hotel.

Q. Now, as a result of your instructions from Mr. --

MR. BEVANS: Was that question answered, Mr. Royall?

THE WITNESS: No, it hasn't been yet. I am trying to -- trying to figure out when this -- when these -- I would say some time -- it seems to me some time in May or June.

BY MR. ROYALL:

Q. Of what, 1957, 1958? A. 1958, 1959. I didn't get down to the 1959 one. Down there for another meeting.

I am trying to sort these meetings out in my mind, as to when they were. It seems to me that the Jersey Chamber of

Commerce was in 195 --was in the latter part of May or the first of June 1958.

And I was down in Washington -- I had been down there several times for different types of meetings.

This is -- this is the difficulty, in trying to sort it out.

But did I answer your question here, the meeting of '58?

Q. Was in May? A. May or June.

Q. May or June of 1958? A. Yes.

Q. And your suggestion was that these customers be urged to appear -- or rather to write their Congressmen -- A. No.

Q. -- urging them to appear at the oral argument in behalf of American? A. No. This was not a suggestion. I'd like to clear that point up. This was not a suggestion as such.

This was in a general discussion, and where I apparently said -- and this is the way, it is the only way I can reconstruct -- I said there are a lot of customers, that are interested in better service into San Francisco, that they had difficulty in getting space and getting schedules, and that these customers had told this to me, and to

my sales representatives in making their sales calls.

And I thought that they would be interested in additional. But this was not in a form of a suggestion, this was just a general discussion which I had with Dwight.

Q. Well, what if anything did you suggest to Mr. Taylor that these people might be asked to do in order to make their wishes felt or known? A. I said that I thought that they might be interested.

Q. In doing what? A. In an additional service into San Francisco.

Q. Yes, that is correct, but did you suggest any means by which such people who were dissatisfied might make their wishes known, and to whom? A. No.

Q. You did not? A. I suggested that they were interested in additional service, and I thought -- that is about -- that is about it.

Q. Well, Mr. Smith, I am having difficulty with your various answers here, and I thought you had testified a few minutes ago as to my question as to whether or not you questioned or mentioned the possibility of "contacting customers to determine whether or not they," the customers, "would write their Congressmen urging them," that is, the Congressmen,

"to appear at oral argument in favor of American."

Now, I thought your answer was yes to that, is that correct? A. No, my answer is not yes to that. At this point I didn't know of any oral argument.

My only point in discussing this --and it came up in the general discussion -- was that these people were interested in additional service into San Francisco.

We had a lot of customers that felt additional service was warranted. At that stage of the game I didn't know of any oral argument, or oral discussion.

Q. Then you did not suggest any activity to Mr. Taylor that might be carried out in making the wishes of such customers know, is that right? A. That is about correct.

Q. And that would be true as to travel agents, too, that you made no suggestion or you participated in no discussion relating to the manner in which such customers might communicate with other people in making their wishes known? A. My only thought was that these people would be interested in additional service, and this is what we were discussing.

But so far as how to do this, I myself was no authority on that.

[6106]
[Tr. 582]

Q. Then you made no suggestion in that relation in your discussion with Mr. Taylor either at the regional sales managers meeting or at the subsequent Chamber of Commerce meeting to which you have referred? A. It never came up at the regional sales managers meeting as such, because it was strictly -- this was strictly more or less of a talk by Dwight Taylor.

Q. Then you feel it was at the Chamber of Commerce meeting? A. It would have been after. This was not at a meeting. This was in discussing with Dwight after some meeting. This I remember.

Q. Well, I'd like to pinpoint that date as closely as you can where this discussion came up, where you mentioned the fact that there were dissatisfied customers in the New York area, and with Mr. Taylor.

Now, when and where can you identify when and where that discussion took place? A. Well, the best time to tie this down at this regional meeting, at the Chamber of Commerce meeting, and these dates seem to coincide.

It was some time I would say in the latter part of May or June 1958.

Q. Did Mr. Taylor subsequent to May or June of 1958 ever

[6107]
[Tr. 583]

discuss that matter with you personally again? A. No.

Q. He did not. A. No.

Q. Then the next discussion you had was with Mr. Morris Shipley, is that correct? A. That is right.

Q. Did Mr. Shipley refer to the fact that you had mentioned any such thing to Mr. Taylor in the past? A. No.

Q. What if anything did Mr. Morris Shipley tell you or instruct you or advise you to do in relation to such persons or customers? A. Mr. Shipley told me that the oral hearing was coming up, and this is -- by the way, is about the first time I heard of this oral hearing -- just that I get in touch with our customers, those customers who might be interested in additional service into San Francisco, and request that if they felt they could, or would, they would write their Congressmen or Senators to appear at the hearing. And --

Q. I think you adverted to this previously, but I would like to understand you thoroughly. Did you state that you took customers to mean travel agents, it would include travel agents?

A. Customers would -- yes, our customers were travel agents, commercial accounts, military.

When I refer to customers, this is what I mean, it is a cross-section of our --

Q. Now, in response to Mr. Morris Shipley's direction -- I believe he was vice-president at that time, isn't that right, sir? A. Yes, at that time he was.

Q. Vice-president of American Airlines? A. Yes.

Q. -- what if anything did you do to carry out Mr. Shipley's instructions? A. I communicated these instructions to my managers, and I had a manager in New Jersey, and a manager of agency sales and a manager of commercial sales in New York.

Q. Would you please state what those gentlemen's names were? A. Yes, these -- George Smith was the manager in New Jersey. And Art Thompson, was the manager of commercial passenger sales in New York. And Jim Mansfield was the manager of agency sales in New York.

See, we broke down in New York a little differently than in New Jersey.

Q. What did you tell these gentlemen to do in relation

[6109]
[Tr. 585]

to the San Francisco-New York Non-Stop case? A. Pretty -- pretty much the same thing that Moe told me.

Q. That who told you? A. Morris Shipley.

Q. Morris Shipley told you? A. I asked that -- that they in their next meeting with the salesmen or their sales representatives, which they had once a week, that they ask their sales representatives on their routine calls to -- where they thought with propriety that the people were interested in this San Francisco deal -- ask the customers if they would contact their Senators or their Congressmen to appeal -- to appear at the oral hearing.

Q. Did you receive a report from your -- I believe you called them managers -- A. Yes.

Q. -- as to the results of their contacts in this regard? A. No specific report, no. I didn't ask for any report, and didn't get any.

Now, I -- I sat in on some of the staff meetings at a later date, after this was done, to find out what the reaction was.

Q. Did you ever see or know of any response by any

[6110]
[Tr. 586]

of the customers in writing to their Senators or Congressmen about the case -- A. Well, I --

Q. -- as a result of the activities of the gentlemen you mentioned? A. No, I didn't see anything. I -- they naturally reported on -- at the meetings, again, on the overall reaction, and this was pretty much generalities, as to how the various people they had approached had felt about the San Francisco case, and about writing letters or sending wires in; sir.

But I didn't ask for any report, nor received any report; nor did I see any letters that had been written.

Q. Did anyone in American Airlines in an official capacity ever warn you or tell you to avoid any possible impropriety on your part or the part of your managers in making approaches to customers? A. No. Warn me of an impropriety?

Q. Of any possible impropriety, or to be careful in making these contacts, or any special instructions -- A. No.

Q. -- as to how -- A. No, I never --

[6111]
[Tr. 587]

Q. -- just -- A. This was just -- resulted from a phone call which I got from Morris Shipley, and there were no instructions as such, no.

MR. ROYALL: That is all we have on direct, sir.

EXAMINER STODOLA: Counsel may cross-examine. Mr. Bevans?

[6112]
[Tr. 588]

CROSS EXAMINATION

BY MR. BEVANS:

Q. Mr. Smith, I am somewhat confused. You placed the regional sales meeting in Washington in the summer or early fall of 1958; and then you placed the New Jersey Chamber of Commerce meeting as in May or June of 1958; and yet I think at two or three points in your testimony you indicated that the Chamber of Commerce meeting was subsequent to the sales meeting.

I am not trying to confuse you, Mr. Smith, but is there some way we can pin this down? A. I might be confusing you on that. I am pretty sure that the Chamber of Commerce meeting was before our sales meeting, if this helps clarify it.

I also stated that I had been down in Washington on several other occasions, but so far as I can reconstruct this thing, it was either the Chamber of Commerce meeting or our regional staff.

Q. Do you have any records, diaries or other papers which might indicate the exact date of the meeting that you had with Mr. Taylor? A. No, because this was not a meeting as such; this was in a discussion which I had with him. It was a personal discussion -- I think only Mr. Taylor and myself.

MR. WESTWOOD: Mr. Examiner, if any counsel desire, we will try to ascertain the exact date. There is no point in having any confusion about that New Jersey Chamber of

Commerce meeting.

THE WITNESS: No. That can be cleared up very easily.

MR. BEVANS: And of course your Eastern Regional Sales meeting, that should be easy.

MR. WESTWOOD: Yes.

MR. BEVANS: I think those two dates might help.

MR. WESTWOOD: All right.

EXAMINER STODOLA: Very well, Mr. Seeger, will you supply that then?

MR. SEEGER: Yes, I will, Mr. Examiner.

BY MR. BEVANS:

Q. As I understand the customer support that you hoped to elicit, that would come from, possibly, large corporation users of air travel, among others. A. Yes, that's right.

Q. Do you know whether such users were in fact approached? A. Yes, they were. The only way I say I know is that at some of these meetings which I sat in on, at which the sales representatives discussed it, that the large corporations were definitely approached.

Q. Do you know specifically any large corporation that was approached? If I asked you about certain large corporations, would you tell me whether they were approached, or would you know? A. I might, and then again I might not, because this

was a general report. I didn't ask, again, for a specific report from the men, so --

Q. Did you do any of it on your own, Mr. Smith? A. No.

Q. You didn't approach any? A. No.

Q. Do you know whether American Machine & Foundry was approached? A. So far as I know, no, they were not. But I don't know, as I say. This didn't come up in our discussion.

Q. Who would be responsible for approaching that corporation, if it was approached; that is, whose territory would that fall in at that time? A. Well, this would have been under Art Thompson, who headed up commercial passenger sales. What sales representative I couldn't answer specifically. He had 14 men assigned to New York City, and I don't know the specific accounts which were assigned to those men, to quote from memory.

Q. Would you know whether Ebasco was approached? A. So far as I know they weren't.

Q. That company, Ebasco, I believe is located at 2 Rector Street. A. Yes.

Q. That is my recollection. Whose territory would that be, do you know?

A. Well, that again, you see, all of this would come under Art Thompson, our commercial passenger sales manager, and the specific sales representative -- this could be any of a number of people. We would have to check through the commercial passenger sales division to find out what sales representative was handling that account.

Q. Do you know any large industrial user in the City of New York who in fact did write? A. No.

Q. Do you know how many large industrial users were contacted, in round numbers, as a result of this staff meeting that you had later? A. No. These were a series of meetings that I sat in on, and this was only one of many topics which was discussed, but this was not done on any specific outline, it was to be done on their routine calls, when they made calls on these accounts. So it is just however many accounts they contacted, and where they discussed this. I never had a report on the number, so I -- it is impossible to answer that.

Q. In general terms, how many times would a salesman call on an account such as International Business Machines in the course of a month? A. I think right now probably IBM is on a 30-day frequency.

[6116]
[Tr. 592]

Q. Would that be about the most frequent? A. Yes, something like that, unless something specific came up which -- it might be less than that, it might be 60 days, but --

Q. Were any of the suggestions or instructions or outline of this program that you were undertaking ever reduced to writing? A. No. It wasn't really that much of a program, as such. I guess you would call it a program, but this was to be done in the routine sales call, and no specific program per se.

Q. Did Mr. Adamson work for American Airlines at this time? A. Yes.

Q. What was his job, can you tell me? A. Sales representative.

Q. Was it a part of his duties to visit travel agents? A. Yes. On Long Island they visited travel agents as well as -- in certain parts of his territory they visited travel agents as well as commercial accounts.

Q. How about The Bronx? A. The Bronx?

Q. Did he cover The Bronx? A. Well, he has had a shift in territory two or three times. Let me put it this way: at one point he did cover The Bronx. What period are you referring to?

[6117]
[Tr. 593]

Q. This 1959 period, when you undertook this -- A. I think for part of that he had The Bronx, and I say I think, only because there were several changes in the men's territories, geographical territories, right through that period. This was up to their local managers.

MR. BEVANS: May I have just a moment, Mr. Examiner?

EXAMINER STODOLA: Yes.

MR. BEVANS: That is all I have. Thank you, Mr. Smith.

EXAMINER STODOLA: Mr. Rett?

BY MR. RETT:

Q. Mr. Smith, were you told of any travel agents that some of your men contacted with a view to sending telegrams or letters to Congressmen? A. Was I told of any travel agents?

Q. Yes. A. Not specifically as such. Again, it came up at these meetings, and I -- let me clarify this meeting deal. As manager of the area, I used to attend local meetings from time to time of my various sections. That's the way this came up. It wasn't a meeting specifically called for this purpose; these were general staff meetings which my men had, and, yes, I remember in one in New Jersey -- a meeting that I attended -- it had come out that one of the travel agents was very definitely interested and had written.

Q. Who was that agent?

[6118]
[Tr. 594]

A. This was Rona Travel.

Q. Otherwise your men in the New York area just told you in general terms that they had talked to travel agents? A. I didn't happen to be at a New York meeting at the -- at a staff meeting at the point where this came up in detail, so I was just advised that travel agents had been contacted and --

Q. And large commercial accounts had been contacted? A. Well, no. You see, in New York we broke down into travel agents and commercial accounts --

Q. I see. A. -- where in the outer areas they were all under one man.

Q. Can you recall any other agent that you were told by name who was contacted? A. No, not at that stage of the game. The reason I particularly remember Rona is because having been in New Jersey at one stage of the game, his name came up.

Q. Well, you say you can't recall at that stage of the game. You mean you can't recall at all of any other -- A. No, no, I guess I didn't word that right. The reason that Rona -- I think that we discussed Rona, because I knew Ed Josephson, and one of the boys brought up that they had contacted the agents, and that Rona Travel had written either their Senator or their Congressman -- I don't know who it was.

[6119]
[Tr. 595]

Q. But at this time you cannot specifically recall any other agents' names? A. No.

Q. This telephone call that you had from Mr. Shipley, which was in late March or early April, was Mr. Shipley in New York at the time, or was he in Washington, or -- A. I think he was in New York then.

Q. Did you have one conversation with him about it? A. That's right.

Q. Give me that conversation as best you can. What did he say and what did you say? A. Well, as best I can, going back, when he called me he said that it might be a good idea on our routine calls on our accounts to suggest to them if they were interested in additional service to San Francisco, that they write their Congressmen to appear at this oral hearing. Now this is to the best of my knowledge.

Q. Now let me ask you did you, in instructing your people, ask them to appear for the purpose of supporting American's position or application, or were you interested in having them appear to support Northwest's application? A. Oh, no, we were interested in having them appear to support American's application as the third carrier.

Q. Well, now, did you, in telling your people, tell them to ask these customers and agents to urge their

Congressmen and Senators to appear at the oral argument or simply to send a communication to the Board? A. No, it was to appear, to appear at oral arguments.

Q. Why was it important that they appear at oral argument, from your standpoint, instead of simply sending a communication? A. Well, this is --

MR. SEEGER: Mr. Examiner, excuse me. I object to that question. Mr. Smith has testified as to what the instructions were that were given him, he has said nothing about why anything was important or not important.

MR. RETT: All right. If that is it, he can answer it that way. That's all I want to know.

A. This is what I was going to say. This is what I was told to do by Mr. Shipley.

MR. RETT: I think that is all. Thank you.

EXAMINER STODOLA: Mr. Healey.

BY MR. HEALEY:

Q. I would like to clarify one point, Mr. Smith. All of this program when you contacted travel agents was done pursuant to Mr. Shipley's call, and that was with regard to oral argument; is that true? A. That's right.

Q. With regard to Mr. Taylor's conversation with you earlier, was it your testimony that absolutely nothing was

[6121]
[Tr. 597]

done pursuant to that conversation? A. That was just a general discussion about the dissatisfaction of some of our accounts as to -- as far as the service that was being rendered into the San Francisco --

Q. But nothing came of that discussion? A. No, not at that stage of the game.

MR. HEALEY: Thank you.

EXAMINER STODOLA: Mr. Needles?

MR. NEEDLES: No questions.

EXAMINER STODOLA: Mr. Bennett?

MR. BENNETT: No questions.

EXAMINER STODOLA: Mr. Seeger?

[6122]
[Tr. 598]

BY MR. SEEGER:

Q. Mr. Smith, you mentioned a Mr. Ed Josephson. Who is he connected with? What was his title? A. He, Ed Josephson, heads up Rona Travel Agency in Jersey.

Q. Now, under the instructions you gave to your managers, were the sales representatives supposed to raise the matter of oral argument in the New York-San Francisco with all of their contacts, or was this left to their discretion? A. Pretty much left to their discretion.

MR. SEEGER: I have no further questions, Mr. Examiner.

EXAMINER STODOLA: Any further from you, Mr. Royall?

MR. ROYALL: Yes, sir, I have several.

BY MR. ROYALL:

Q. You spoke of the fact, I believe, Rona Travel Agency had complained of the space situation between New York and San Francisco on the non-stop basis, is that correct? A. No, I didn't say complained. I said he wrote in, thinking that -- so he was contacted by one of our sales representatives, not me. So I don't know whether he ever complained or not, but he did -- he was one of the -- specifically I remember this because I attended a meeting where he was one that went on record as thinking that

additional service was necessary in San Francisco, but specific complaint—

Q. Now, you have stated previously here that your remarks to Mr. Taylor relating to this service, were occasioned by complaints or the inability of persons to get space? A. That is right.

Q. To the West Coast, to San Francisco? A. Right.

Q. Will you please tell us who had complained to you other than Rona that you have mentioned here, or that Rona had -- A. Rona didn't complain specifically.

Q. Let us forget the word complain, then.

Just broaden it to American's contention that more space might be desirable, or whatever you want to call it, but will you please state what other account you had or travel agency had brought it to your attention that they desired more space going to the West Coast and had brought it to American's attention.

Now, that is my question.

A. Yes.

Q. Will you please state it? A. Well, brought to my attention, which I would expect would be American, one of them was Johnson & Johnson.

[6124]
[Tr. 600]

EXAMINER STODOLA: Where are they located?

THE WITNESS: They are just outside of Plainfield, New Jersey. That is their main office.

MR. NEEDLES: Did you say New Jersey?

THE WITNESS: In the case of J&J, yes.

BY MR. ROYALL:

Q. Can you state on about what date the Johnson & Johnson registered their dissatisfaction with the existing service? A. They had been doing that right along. They have a plant out there, just in the suburbs of San Francisco. I can't say specifically because I got it on several occasions. I happened to get this one directly myself from J&J.

Q. Can you recall the name -- A. I can't think --

Q. Can you recall specifically the name of the person from Johnson & Johnson that contacted you and registered this dissatisfaction? A. I hate to give this fellow's name --

Q. Well, you have brought up the subject, Mr. -- A. All right. You brought it up.

EXAMINER STODOLA: Let us have the name and shorten this.

THE WITNESS: Walt Kabot.

[6125]
[Tr. 601]

BY MR. ROYALL:

Q. Walter Kabot? A. Kabot. At that time he was general traffic manager. He has been promoted. He is further up the line.

Q. Are there any other organizations that have complained to you or registered their dissatisfaction with the existing New York-San Francisco air service? A. That came directly to my attention, not through me, Esso.

Q. Could you name the name of some individual who communicated with your company? A. Because this was not done directly with me but through one of the sales representatives. I can't give you the name on that. I can probably find the name out, but I can't give it to you.

Q. What was the sales representative's name who communicated this to you? A. This came up again in one of these meetings. I think at that point it might have been Cliff Coddington, but I am not sure.

Q. Any other accounts that expressed dissatisfaction to you or to your sales representative which you had in mind when you were talking with Mr. Taylor about this problem? A. As I remember, Sperry was one and I can't give you the name of the man out there. I can also say that John

Agar, who was of Karoly Travel in Plainfield was another, if you want a name there, and as I recall also The Travel House of Great Neck, but again I don't know who in the Travel House of Great Neck. That is out in Great Neck.

Q. Could you give us the names of these last ones that you have mentioned like Sperry? A. Well, this was all back before I had talked with -- so it must have been the early part of 1958 I would say, or before. This was not from one remark, but usually from several, as in the case of J&J.

Q. How many commercial accounts and travel agents did you have at that time approximately in the New York New Jersey Metropolitan area, the New York-Metropolitan area? That is, including New Jersey. A. Well, I think that the travel agents is somewhere in the neighborhood of 500.

Q. About 500 travel agents? A. I would say that in that area, 490 some odd. Now, this takes in New Jersey, Long Island, Westchester, Lower New York State and Manhattan, of course. This is travel agents.

Now, accounts --

EXAMINER STODOLA: Are these commercial accounts that you are talking about?

MR. ROYALL: Commercial accounts.

[6127]
[Tr. 603]

THE WITNESS: Yes.

A. Well, the best way to say that is 1400 accounts. You can carry this on and on but these are accounts where we had scheduled calls.

Q. So out of those approximately 490 travel agents you had expressions of dissatisfaction from two, to your knowledge? A. Well, there was more than that, based again on meetings which I attended from time to time.

I didn't get specifically into the cases. These I happened to know about. If I go back and try to reconstruct some of the other names -- but there was dissatisfaction from more than two, as this general trend, and all I tried to do when I attended these meetings was get a general feeling as to what was going on in the territory from the man.

Q. When and how did you find out that Rona Travel Agency had written to its Congressman? A. Let --

Q. Specifically, Senator Clifford Case of New Jersey. A. Well, he told our representative who I believe at that time was Jim Bowlin, when he was in there, that he was going to write.

Now, so far as when he wrote, I don't think we got any report on when he wrote, as we did on any of these. I

[6128]
[Tr. 604]

wasn't aware of any report.

MR. BEVANS: The witness keeps using he and Rona is a corporation.

THE WITNESS: Let me see if I can't clear that up. Rona is a corporation. Ed Josephson is the president of the corporation. Does this --

MR. BEVANS: When you say he, are you referring to Mr. Josephson?

THE WITNESS: I am referring to Mr. Josephson.

MR. BEVANS: Do you know whether Mr. Josephson authorized the sending of the letter?

MR. SEEGER: Mr. Examiner --

MR. BEVANS: I just wanted to clear this up.

THE WITNESS: Well, I am sure he did, because he being president of the corporation, I don't know, I assume he wrote it, but --

MR. BEVANS: But you don't know?

THE WITNESS: No, no, I don't know.

BY MR. ROYALL:

Q. Mr. Smith, I refer you to a letter written by Rona Travel Service, by Mr. Mitchell I. Kattler, to Senator Clifford Case -- A. Yes, he worked for --

Q. -- dated February 17, 1959, and I ask you to read that letter found on page 252 of volume 1 of the Joint Appendix of this case? A. Yes. Mike Kattler worked for Josephson, still does

as far as I know. Do you want me to read this?

Q. I just want to ask you several questions. A. I am not familiar with the letter.

(Pause)

Okay.

Q. Now, I believe that you said that one of your representatives, Jim Bowlan, contacted these people with a view to writing a letter to Senator Case? A. Yes, one of our Sales representatives.

Q. Do you know which one that was? A. I assume Bowlan in New Jersey handles all of the agencies. Now, this was written in February. I assume this would be Jim. See, he didn't work directly, but for one of my -- for George Smith.

Q. I call your attention to the date of that letter Mr. Smith, February 17, 1958.

EXAMINER STODOLA: 1959.

Q. 1959.

I believe you testified it was in the spring of 1959 that Mr. Morris Shipley gave you instructions to have your people go ahead with this program of having customers write to their Congressmen with a view to having them appear at oral argument. Isn't that what your testimony has been? A. That is right.

[6130]
[Tr. 606]

Q. Now, I am asking you if you can find anything in that letter wherein Rona Travel Service requests anything about oral argument by Senator Case? A. It doesn't.

Q. Do you want to stand on your statement that it was in the spring of 1959 that Mr. Shipley gave you the instructions or would you like to revise that in view of the data appearing on that letter? A. I don't understand it, unless I am way off in my timing. I would say it was in the spring of 1959. In short it doesn't look like it, does it?

Q. Well, I would like to ask you if that letter would not lead you to believe or convince you that Mr. Shipley's instructions came somewhat earlier than April of 1959 or the spring of 1959?

EXAMINER STODOLA: The spring comes in March, does it not?

THE WITNESS: Yes, it does.

MR. ROYALL: It depends on where you are.

BY MR. ROYALL:

A. I thought it was in March. That is all I can say. I thought it was in the early spring, and February 17th could be real early spring.

Q. Well, Mr. Smith, the Examiner's initial decision had not yet been issued on February 17th.

It was issued on March 9th. Do you mean that Mr.

Shipley was already lining up people or directing you to line up people for oral argument before the Examiner's decision was out? A. It has the date, received February 18th. I don't know how this happened, because I had no instructions nor did I issue any instructions before I heard from Mr. Shipley and I thought I heard from Mr. Shipley in the spring of 1959, and I thought it was around March.

Q. I would like to repeat my question.

Do you wish to stand on your statement that it was March, at least March, or would you like to revise it and say you don't know exactly when you got those instructions from Mr. Morris Shipley? A. Well, I am beginning to think I don't know based on this letter. I don't know what would have prompted the letter otherwise.

MR. ROYALL: That is all.

EXAMINER STODOLA: If there is nothing further, you are excused, Mr. Smith, and thank you for your testimony. I assume there is no need to excuse Mr. Smith subject to recall, is there?

MR. ROYALL: I think we would like to have the right to recall him, although I don't have anything at the moment. Certainly you can go back to Nantucket. I wish I could go with you.

THE WITNESS: Thank you.

* * * * *

[6132]
[Tr. 608]

Whereupon,

CHARLES L. STRICKLER,

recalled, having been previously sworn, was examined and testified further as follows:

CROSS EXAMINATION

BY MR. BEVANS:

Q. Mr. Strickler, I think your testimony was that for some 14 years you have been familiar with Civil Aeronautics Board proceedings, is that right? A. I think it is in excess of 15 years.

* * * * *

[6135]
[Tr. 611]

THE WITNESS: May 3rd.

I feel certain that Raleigh, North Carolina, has made pleadings - or Charlotte, I am sorry. Charlotte, North Carolina, and I am sure, too, that was incorporated in the Southwest, Northeast case.

[BY MR. BEVANS:]

Q. Was it on the basis of activities in those proceedings that you formulated your opinion that there was no prohibition against ex parte communications prior to a pre-hearing conference? A. Well, not just that activity, but my understanding of the Board rules and principles of practice made it perfectly proper for communications prior to notice of hearing.

Q. Is that based on the words of the Board's regulation?

[6136]
[Tr. 612]

A. My understanding.

Q. Principles of practice? A. My understanding of the Board's rules --

Q. Now your understanding -- A. Well, obviously the words of those rules and principles --

Q. -- must be taken from -- I am sorry.

Your understanding must be derived either from the literal language of the Board regulations, or what has occurred in the past, and has achieved common acceptance. Now, which is it? Is it the words of regulations of part 300 of the Board's principles themselves? A. It is both, my understanding of the principles and the rules and the experience, my knowledge of what had happened in the past.

Q. And is the knowledge of what happened in the past derived from the cases which you mentioned which were cases that had some activity between the time some application was filed, and the time there was notice of a pre-hearing conference? A. Well, there may be others, Mr. Bevans, but I would include those I just mentioned.

* * * * *

[6175]
[Tr. 651]

EXAMINER STODOLA: * * *

[6176]
[Tr. 652]

All right, let us have the question read back.

(Question read).

EXAMINER STODOLA: Mr. Strickler?

THE WITNESS: I am thoroughly certain that that fact was presented in the documents, but that was only one of many.

[BY MR. BEVANS:]

Q. Did you discuss with Mr. C. R. Smith before he made his remarks the content of his remarks to the luncheon in San Francisco on November 4, 1957? A. I did not.

Q. Did you discuss this matter with Mr. Berksmith? A. I did not.

Q. In your testimony you indicated that you had had some meetings with Mr. Donald Cleary. Can you tell us when those were? A. Yes, Mr. Bevans. And that reminds me that perhaps I made an error in testifying in connection with that earlier. I think that in an answer to someone's question either yesterday or the day before, I testified that I discussed the pending motion of American Airlines with Mr. Cleary.

I met Mr. Cleary in November of 1957, after American's motion had been denied. What I meant to say was that I discussed that document, American's motion, with Mr. Cleary.

Q. You mentioned you met him in November 1957. Where, Mr. Strickler?

A. In San Francisco.

Q. Did you know what his position was at that time? A. Well, it was either made clear to me at that meeting or I knew it shortly before that, but I think it was pointed out to me at that time.

Q. Who attended the meeting? A. I believe Mr. Martin introduced me to Mr. Cleary.

Q. So it was Mr. Martin, Cleary and Strickler? A. Yes.

Q. Is that all? A. Yes.

Q. Did Mr. Martin and Mr. Cleary indicate to you what they intended to do with respect to the San Francisco-New York nonstop issue at that point? A. Well, I understood when I met Mr. Cleary that the City was considering sending him to Washington. That was about the extent of my understanding.

Q. You were in San Francisco at the time? A. Yes.

Q. I assume you were reading from time to time the local newspapers, the San Francisco newspapers, at least in so far as they bore on American Airlines' interests. A. I usually read the newspaper rather thoroughly, Mr. Bevans.

Q. Well, according to the contemporary newspaper accounts

[6178]
[Tr. 654]

Mr. Cleary was going to quarterback a pressure campaign on the Congress of the United States to get a hearing on a third nonstop carrier between San Francisco and New York. Is that your recollection of what you read in the local newspapers?

MR. SEEGER: Mr. Examiner, let us see the clipping from the newspaper. There is no reason why we should have Mr. Bevans paraphrasing a clipping from a newspaper, and then transmitting it to Mr. Strickler, and have his understanding of the newspaper article.

MR. BEVANS: This is something, Mr. Seeger and Mr. Strickler have known for the last three years.

EXAMINER STODOLA: He simply asked the witness whether that is his recollection of what the clipping says.

MR. BEVANS: I can provide it. It is all in the record of -- it is in the record of this case, it is in the transcript of oral argument.

The Chairman of the Board was very incensed about this matter.

MR. NEEDLES: Mr. Examiner, I would like to object to the question on the grounds of relevancy. What was published in the newspaper cannot be attributed to this witness. Whether Cleary was going to quarterback it or not has no relevancy on that. What a newspaper reporter put in the paper is his own expression and cannot be attributed to anybody

[6179]
[Tr. 655]

in San Francisco, except the newspaper reporter.

EXAMINER STODOLA: At this stage of the proceeding I think the question is relevant, Mr. Needles.

THE WITNESS: Well, Mr. Bevans, I recall some newspaper stories regarding Mr. Cleary's trip to Washington, but I cannot recall the language in any of those stories. They referred to it, that's all I can say.

[BY MR. BEVANS:]

Q. He was a lobbyist for the City of San Francisco in the state legislature, isn't that what Mr. Cleary was? A. That was my understanding of generally what his job was, yes.

Q. And $2,500 was being appropriated by the City of San Francisco to send Mr. Cleary to Washington to get a hearing on a third San Francisco-New York nonstop carrier; isn't that your recollection of what took place, Mr. Strickler?

[6180]
[Tr. 656]

A. Well, I didn't participate in that, Mr. Bevans --

Q. Well, you talked with Mr. Cleary before he left San Francisco.

EXAMINER STODOLA: Just let the witness answer the first question you asked of him.

THE WITNESS: My conversation --

EXAMINER STODOLA: I mean the second last question you asked me, rather.

THE WITNESS: My contacts with Mr. Cleary, Mr. Bevans, were confined solely to my trying to brief him on the background of the San Francisco-New York issue.

I did not participate in this matter which I just referred to.

[BY MR. BEVANS:]

Q. You mean you were called in out of the blue and told to tell Mr. Cleary what is in your motion? A. Mr. Bevans, I don't think I have spent more than 45 minutes or a half an hour with Mr. Cleary in my whole life.

Q. And nobody told you why you were explaining the background of this motion to Mr. Cleary? A. I told you a moment ago that they were considering his coming to Washington.

Q. Coming to Washington to do what, Mr. Strickler? A. I never really knew, and I don't know today.

Q. Is it your testimony that he was coming to

[6181]
[Tr. 657]

Washington quite apart from the issues posed by your motion? A. I think there were other matters which he was going to take care of, but I don't know what they were either.

Q. You mean you took 45 minutes of your time to talk to Mr. Cleary when you didn't know what he was going to do in Washington about your motion, after you explained it to him? A. I didn't know specifically. I suppose he was going to discuss it with his Congressional people. I don't know what extent he did, or he planned to.

Q. Now, tell us about the discussions with Mr. Martin at that time; did you talk with Mr. Martin for only 45 minutes? A. At that time?

Q. At that time. A. Well, as I recall the meeting, it didn't take that long.

Q. Where is the meeting held, Mr. Strickler? A. In San Francisco.

Q. At whose office? A. Mr. Martin's office.

Wait a minute, Mr. Bevans, I -- I did. I want to change that, because I recall now I did have luncheon with

[6182]
[Tr. 658]

Mr. Cleary one other time.

So that would -- I know there are two times in San Francisco I saw Mr. Cleary, two different occasions.

Q. When was the luncheon with Mr. Cleary on the other occasion? A. It was in San Francisco, too. I think it was probably the next day, the following the day I was introduced to him.

Q. Did you further discuss the contents of American's motion? A. Yes, and San Francisco's answer.

Q. Did he make any further statements as to what he was going to do with respect thereto? A. My general impression of what he was going to do was to contact the local Congressman when he got into Washington. But beyond that I don't know. I don't think he had any idea of what he was going to do either. He didn't relate to me --

Q. But you knew it related to American's motion, and to San Francisco's answer in support thereof, didn't you, Mr. Strickler? A. I think it was in connection with the request for a hearing, yes.

Q. And that was the motion that had been denied four and a half months or five months previously?

[6183]
[Tr. 659]

A. Well, that is the document I discussed with him, yes, along with the answer of the City and County of San Francisco.

Q. You spent six days in San Francisco between November 17 and 23, and the purpose of your trip was the San Francisco-New York Non-Stop as indicated by page 11 of BOE 9, isn't that true, Mr. Strickler? A. I accept that as true. If you are reading from the report --

Q. Do you want to look at the page of the exhibit? A. -- I don't have it. I accept it.

Q. And it is contained on this page of that exhibit that on Tuesday, November 19th, 1957, you had four people at luncheon and three people at dinner; that on Wednesday you had three people at luncheon and three people at dinner; on Thursday you had two people at luncheon, and five people at dinner; on Friday you had four people at luncheon; on Saturday you had three people at dinner.

And I assume that all that activity surrounded the question of New York-San Francisco Non-Stop Service, isn't that true, Mr. Strickler? A. It probably did.

Q. And you knew at that time that within a week or two of these dates that the Board staff report had been ordered, that is, that was the due date of the staff

[6184]
[Tr. 660]

report to the Board as to whether it was going to have an expedited hearing; isn't that true? A. I think that is the date it was due, some time at the end of the year, first of January.

Q. And you talked with Mr. Martin and Mr. Cleary with respect to what could be done to advance that cause, didn't you, Mr. Strickler?

A. I believe I did, yes.

Q. And Mr. Martin and Mr. Cleary told you that they were going to come to Washington to see what they could do about it, didn't they?

A. Well, I -- as I said, Mr. Cleary was coming to Washington, but about this time, Mr. Bevans, early in November, I became aware that the -- I believe the City of Houston and Orlando had conferences, and -- informal conferences scheduled with the Board.

It occurred to me that that might be appropriate for San Francisco. And I believe I suggested this to San Francisco.

Consequently, I believe that during part of this period that you referred to, I attempted to familiarize Mr. Martin and I believe Mr. Schlesinger inasmuch detail as I could in this case, and other -- actually -- and other San Francisco service problems, in the hope that they could obtain a conference with Civil Aeronautics Board.

[6185]
[Tr. 661]

They did have a conference, as you know, I believe some time early in December.

A good part of this time to which you are referring now involved my familiarizing Mr. Martin and Mr. Schlesinger on this case.

* * * * *

[6187]
[Tr. 663]

THE WITNESS: That isn't quite correct, Mr. Bevans, I think you flatter me. I made a suggestion that I thought it would be appropriate for San Francisco to ask the Civil Aeronautics Board for a conference.

I thereafter discussed with Mr. Martin and Mr. Schlesinger in some detail, San Francisco's service problems. Now, beyond that --

* * * * *

[6191]
[Tr. 667]

CROSS EXAMINATION

BY MR. RETT:

*   *   *   *   *

[6210]
[Tr. 686]

Q. Now, did you in 1957, the first part of 1957, have any discussions with anyone in American Airlines about having travel agents in the California area send letters to the Board or Congressmen in regard to a hearing on the third carrier nonstop issue?

[6211]
[Tr. 687]

A. I certainly did not.

Q. This goes back in 1957? A. That is correct.

Q. Well, did you do anything about that yourself? Did you ask any of American's representatives to request travel agents to communicate with the Board re a hearing on the third carrier issue? A. I did not.

*   *   *   *   *

[6228]
[Tr. 704]

Whereupon,

GEORGE H. SMITH

was called as a witness and having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYALL:

Q. I believe your name is Mr. Robert S. Smith. A. No, it is not.

Q. I beg your pardon? A. I am George H. Smith.

Q. Your name is George H. Smith; is that correct, sir? A. Yes, it is.

Q. And you are an employee of American Airlines? A. Yes.

Q. During 1957, 1958 and 1959 were you also employed by American Airlines during those years? A. Yes, sir.

Q. In what capacities were you employed during those three years? A. 1957 I was a sales representative in New York City;

in 1958 I was district manager of sales planning for New York City; at the end of 1958 and in 1959 I was the sales manager in New Jersey, for the Northern thirteen counties.

Q. During your employment at that time were you aware of American Airlines' application for authority to fly nonstop between New York and San Francisco? A. Yes.

Q. Did you ever contact any persons in relation to that at the direction of any superior of yours? A. Yes.

Q. By whose direction was that activity, Mr. Smith? A. In 1959, at the direction of Robert S. Smith, at the suggestion or direction of him.

Q. Would you please state what his directions were. A. Well, in the course of a staff meeting early in 1959, the point was made that the hearings, the oral argument on the San Francisco nonstop case would be coming up, and that it would probably be a help if some of the Congressmen were made aware of this fact and could present their views to the Board, and it was suggested that if we knew people who were interested particularly in the case and they were favorably inclined, we might point out to them that they could get in touch with their representatives and these people could voice their opinions at the oral argument.

Q. Did you personally, as a result of those directions,

contact any travel agents or customers in that regard with that objective in mind? A. I mentioned it on two or three occasions, but specifically

I did not leave my office and go out for this purpose, no.

Q. Did you personally contact any customer or travel agent? A. Yes, at what we would call a joint call. We had a man in New Jersey at the time covering all travel agencies within our area of responsibility. It was my habit, and I was required to make joint calls with him from time to time, but I do remember discussing this on one or two of these joint calls.

Q. Did you ask any of your sales representatives, that is, the ones working under you, to carry out the directions which you had received from Mr. Robert S. Smith in this connection? A. I brought up at a meeting in Newark that it would be a good idea to obtain this support, but we did not have a specific campaign to do this.

Q. Can you name any travel agents or customers who were contacted by you or in your presence by one of your representatives? A. Yes, I can.

Q. Will you please name them, sir.

[6231]
[Tr. 707]

A. International Travel Service in Paterson. I talked to the president, Curt Kent. I talked to O'Donnell Travel Service, Terry O'Donnell, because at the time he was president of New Jersey ASTA, and I think I talked to John Apgar, president of Karoly Travel, who is now president of the New Jersey ASTA. I was relatively new in New Jersey at the time, and these were the men that I knew.

MR. BEVANS: May I have the second of those that you mentioned?

THE WITNESS: He was Terry O'Donnell, president of Red Bank Travel. I think it is T. H. O'Donnell.

[BY MR. ROYALL:]

Q. Were any reports made to you by your salesmen as to what results they obtained in contacting travel agents or customers in regard to obtaining letters to Congressmen? A. I can remember two instances, Conn Travel in Morristown wrote. I don't recall to whom, and Rona

Travel wrote, and again I don't recall to whom.

Q. Will you please tell the names of the salesmen to whom you gave the information with regard to instructions or information which had been received by you from Mr. Robert S. Smith as to possible contacts of travel agents or customers. A. Well, I brought it up at a staff meeting and therefore I assume all the salesmen would have been there. It would have been Jim Bowlin, who handled travel agencies;

it would have been Mike Buckley, who handled Northern commercial accounts; it would have been Ed Colman, who handled Southern commercial accounts, and there would have been Fred Cunningham who handled freight accounts throughout the Northern thirteen counties.

Q. I believe you said that you were present when two travel services were contacted. What specifically was asked of the particular travel agents as to what they might do or what they were requested to do, if anything? A. Well, specifically I don't recall requesting them to take any immediate action, but I do recall personally bringing up the fact that the route case was pending, there were going to be oral arguments, that, you know, if you feel that there is a need for a third carrier and you think we ought to be it, and you can do anything to help the situation, I would appreciate it, period. That was about it.

Q. Were those the same instructions you gave to your salesmen and your representatives working under you in that regard, to make a presentation in that manner? A. It is difficult to recall exactly what was said, but the theme of it was that if we could get some support and that our representatives in New Jersey, that is, elected officials in New Jersey felt we should be a carrier, that they felt that anything like this would probably be good.

Q. Mr. Smith, did anyone in American Airlines warn you

[6233]
[Tr. 709]

to be careful in the manner in which you or your sales representatives contacted the travel agents? A. Your use of the word "careful" -- I assume you mean in regard to this case.

Q. In regard to this case. A. The word "careful" -- our approach on the thing was that there were undoubtedly people that feel possibly more kindly towards American Airlines than somebody else, so obviously you want to go to your friends first.

Q. If I may interrupt, I believe I can shorten it. A. Yes.

Q. My question was directed as to whether or not the manner in which you approached these people as to the matter of whether or not there would be any violation of the rules of propriety enunciated by the CAB or the manner in which -- A. I don't think we got into a discussion of the legality of it, but it is pretty generally known that at these oral arguments a Senator or a Congressman can present his views on it, and that was about the size of it.

MR. BEVANS: I move to strike that as being a conclusion of law of the witness.

MR. ROYALL: It is not responsive.

[BY MR. ROYALL:]

Q. My question was did you receive any instructions in that regard from an employee or superior or official of American Airlines as to how this objective was to be obtained.

[6234]
[Tr. 710]

A. Not in regard to any specific laws. We didn't have a form letter or form presentation, no.

MR. ROYALL: I think that is all.

EXAMINER STODOLA: Any cross-examination? Mr. Bevans?

CROSS EXAMINATION

BY MR. BEVANS:

Q. Did Mr. Bowlin ever relate to you how many contacts he made in this connection? A. We discussed it and I would say yes, he gave me an indication of how many agents he had contacted.

Q. What was that indication? A. Relatively small, ten, fifteen.

Q. Did either of the other gentlemen that you mentioned ever give you an indication of how many contacts they had made? A. No.

Q. Your freight representative and your two commercial representatives? A. No.

Q. So far as you know they made none or they may have made none? A. They may have made none.

MR. BEVANS: Nothing further. Thank you.

EXAMINER STODOLA: Mr. Rett?

CROSS EXAMINATION

BY MR. RETT:

Q. The contact with Conn and Rona were by whom? A. Jim Bowlin.

MR. RETT: That is all.

EXAMINER STODOLA: Mr. Leasure?

MR. LEASURE: Nothing.

EXAMINER STODOLA: Mr. Bennett?

MR. BENNETT: No, sir.

EXAMINER STODOLA: Mr. Seeger?

Mr. Westwood?

[CROSS EXAMINATION]

BY MR. WESTWOOD:

Q. Mr. Smith, do you recall approximately when Mr. Robert Smith spoke to you on this subject? I think you said either suggested or instructed. I have forgotten the term you used, that something along this line be done. A. Well, it is hard to recall, frankly. I think it was in March. It may have been the end of February but probably March.

EXAMINER STODOLA: 1959?

THE WITNESS: Yes.

[BY MR. WESTWOOD:]

Q. The end of February or in March? A. To the best of my recollection.

Q. Well, I show you what purports to be a letter from the Rona Travel Service which for the record appears in Vol. 1

[6236]
[Tr. 712]

of this document which we have been calling the joint appendix, page 252, bracketed. Will you just read that page. A. I have read it.

Q. Now having read that, does that refresh your recollection at all as to the approximate date when Mr. Smith, Mr. Robert Smith, spoke to you about this? A. Well, this would indicate to me, probably, that it was earlier than I originally thought. It probably was before, well, should have been before February 17th. It must have been.

Q. Now I realize that you cannot be precise, and I am not asking you to be precise. Can you tell me whether it would have been likely to have been as early as let's say the 1st of February? A. I am sure it was not, because --

Q. So it was sometime between the 1st of February and the 17th of February? A. Yes. I am virtually positive of that because we had the jet inaugural in January, which kept us completely going, and then the first week in February we had the Electra crash and I know I was personally tied up with that for a week, and we weren't having staff meetings.

MR. WESTWOOD: That is all.

EXAMINER STODOLA: Any redirect?

[6237]
[Tr. 713]

REDIRECT EXAMINATION

BY MR. ROYALL:

Q. Do you know what a Board's initial decision is, what an initial decision is? A. Of the examiner?

Q. Yes. A. Yes, I do.

Q. Wasn't it a little bit unusual to be soliciting support of Congressmen at an oral argument before the initial decision was even issued in the case?

MR. WESTWOOD: I object to that on the ground that no foundation whatsoever has been laid for it.

MR. ROYALL: I have a right to test his credibility, I think.

MR. WESTWOOD: There is no indication that this witness has any knowledge of the usualness of soliciting support of members of Congress.

EXAMINER STODOLA: I think the question is proper.

[THE WITNESS:] There is no question that there is going to be an oral argument, is there? I mean, there is no question about this. There is always going to be an oral argument, as I understand it.

[BY MR. ROYALL:]

Q. Well, I will ask you to answer the question. I am not here to answer it. Will you answer it.

EXAMINER STODOLA: Will you read that question, Mr. Reporter.

[6238]
[Tr. 714]

(Question read).

[THE WITNESS:] I don't know. This was my first experience with something like this.

EXAMINER STODOLA: Anything further?

MR. RETT: Yes, something brought up about Mr. Westwood that I have just one or two questions on, relating to this date.

EXAMINER STODOLA: Very well. Proceed.

RECROSS EXAMINATION

BY MR. RETT:

Q. Mr. Smith, how much after the time that Mr. Robert Smith talked to you about contacting travel agents did you get around to talking to Mr. Bowlin? A. It was my custom to have my staff meeting the same day, following his staff meeting.

Q. The same day? A. Not always, but it was my custom.

Q. And this Electra crash occurred when? A. February 4th.

Q. And you were occupied how long with that? A. Approximately a week.

MR. RETT: That is all I have.

EXAMINER STODOLA: If there is nothing further, you are excused, Mr. Smith. Thank you.

(Witness excused).

[6239]
[Tr. 715]

MR. ROYALL: I would like to call Mr. Bowlin.

EXAMINER STODOLA: Off the record.

(Discussion off the record).

EXAMINER STODOLA: On the record.

Let the record show that counsel have agreed to call Mr. Paul Mason in lieu of Mr. James Bowlin at this time.

Whereupon,

PAUL MASON

was called as a witness and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYALL:

Q. I believe your name is Paul Mason and that you are now employed by American Airlines; is that correct, sir? A. That's correct.

Q. Were you employed by them in 1957? A. Yes.

Q. All of 1957? A. Yes.

Q. And in 1958 and 1959? A. Yes.

Q. And to the present date? A. Yes.

EXAMINER STODOLA: You will have to speak up so he can get it.

THE WITNESS: Yes. I am sorry.

[BY MR. ROYALL:]

Q. Up to the present date? A. Yes.

Q. Would you please give your address. A. Home address?

Q. Yes. A. 1474 Bowers Drive, Seaford, Long Island.

Q. It has been testified heretofore by Mr. George Smith that you were a salesman that worked under his supervision during 1959; is that correct? A. No.

MR. ROYALL: Strike the question.

Q. Who was your superior during 1958, your immediate superior? A. Well, I was not in the sales department in -- until November 3, 1958. Prior to that time I was the chief of terminal service at Idlewild Airport.

Q. When you did go into the sales department, who was your immediate superior at that time? A. Jim Mansfield.

Q. How long did you work under Mr. Mansfield? A. Until January or February of this year, when he was promoted to a general office job.

Q. Did you on any occasion receive instructions from any official or employee of the American Airlines in relation to contacting customers or travel agents with a view to

soliciting their aid in writing their Congressmen to support American Airlines' request for a third nonstop carrier between New York and San Francisco? A. Yes, I received instructions from Mr. Mansfield on that.

Q. Just what were his instructions? A. As I recall, in the early part of 1959, February or March, we were instructed or I was instructed to talk to travel agents for the purpose of, if they felt a third carrier was needed, to write a letter to their Congressmen, indicating such.

Q. Did you carry out those instructions in any respect, Mr. Mason, and if so, how? A. To the best of my recollection I talked to several agencies; discussion of our San Francisco case came up. I don't remember whether I brought it up or they brought it up, but the subject was a logical one, and it came up, and in the conversation I told them that if they felt, as they indicated in their conversation, that they could write to their Congressmen for the purpose of supporting our application.

Q. Can you name any agencies that you contacted, and if so, if you name them, could you name the individuals with whom you discussed the matter? A. Well, there were two of them: Penthouse Travel Service and World View Travel, World View Tours, I guess it is.

[6242]
[Tr. 718]

Penthouse Travel, it was Miss Terry Pollack, and at World View it was Arthur Gelb.

Q. Do you remember the approximate dates on which you talked to these travel agencies and these persons? A. Well, it would have been in late February or early March.

Q. Was there anything specifically that the person was asked to write their Congressman to do in relation to the request of American for a third nonstop service between New York and San Francisco? A. As I recall it, there was not. We made no specific requests or gave no specific instructions to them as to what they should do.

Q. In other words, what was the objective of the letters to be written? Was it just to support American's request in this relation? A. Yes, in the same manner that you hear every day, Write your Congressman this, that and the other, was more or less my understanding of it.

Q. And there was no further suggestion to these persons as to what else should be contained in the letter? A. Not to my recollection, no.

Q. Are these the only two travel agencies that you remember contacting, Mr. Mason? A. Yes.

Q. After making these contacts did you make a written

report to anyone concerning them? A. I made no written report that I recall. But I received, as I recall it, copies of the letters that were sent.

Q. You say you did get copies? A. I got a copy of one of them, as I recall it. I am not sure which one.

Q. Do you recall to whom that communication was directed? A. No, I do not.

Q. What did you do with the copy of the letter after you received it, sir? A. I turned it over to Mr. Mansfield.

Q. To Mr. Mansfield? A. Yes.

MR. ROYALL: That is all.

EXAMINER STODOLA: Mr. Bevans, you may cross-examine.

CROSS EXAMINATION

BY MR. BEVANS:

Q. With respect to World View Tours, that is a corporation of which Mr. Sussman is president, isn't that true? A. Well, Mr. Sussman is no longer with them, sir. He left his participation in the corporation last November, I believe.

Q. At the time we are speaking of -- A. At the time.

Q. Mr. Sussman was president at the time we are speaking of? A. That's correct.

Q. And you discussed this matter with Mr. Sussman initially? A. I believe I discussed it with Sussman. The letter, however, was written by Gelb.

Q. You discussed it separately with Mr. Gelb? A. No. The action, I believe, was discussed with Sussman; Gelb wrote the letter.

Q. Can you recall whether you have ever seen the letter that Miss Pollack wrote? A. Yes, I have.

Q. Do you know where it could now be found? A. Are you referring to the original, sir, or the copy?

Q. Well, the original or any copy. A. Well, I assume it is in the records, but --

Q. That is a mistaken assumption, Mr. Witness. A. Well, all right. I don't know. I have not seen it. As I recall it, she did send a copy and I turned it over to Mansfield and beyond that I can't tell you.

Q. The only help you could be is that if there is a copy available today it would be in Mr. Mansfield's records somewhere?

[6245]
[Tr. 721]

A. Well, that is an assumption I am not prepared to say yes or no on. I don't know the retention period or what is done with the records. We were not asked to get copies.

MR. BEVANS: That is all I have.

EXAMINER STODOLA: Mr. Rett?

CROSS EXAMINATION

BY MR. RETT:

Q. What period of time elapsed from the time you got your instructions from Mr. Mansfield until you saw World View Tours? A. Well, I can't give you a specific answer. I don't think there was too much time elapsed. The earliest possible date that I could have gotten my instructions was February 23, 1959. Now I would say that if I recall it, it was not too long.

Q. Why was February 23rd the earliest possible date you could have received them? A. Well, I was tied up on an assignment involving our Electra accident over here in La Guardia Field prior to that time, and until that time I was given some time off.

Q. So it would have been after the 23rd that you received the instructions? A. Yes.

MR. RETT: That is all.

[6246]
[Tr. 722]

EXAMINER STODOLA: Anything further?

Any redirect?

MR. ROYALL: No, sir.

MR. WESTWOOD: I have a couple of questions.

CROSS EXAMINATION

BY MR. WESTWOOD:

Q. Do you happen to know what Congressman the Terry Pollack letter was addressed to? A. No, I don't know what Congressman it was addressed to. The only thing I recall about my discussion is that while I was still in the office she called a judge who was a friend of hers. I don't know his name, and asked him what Congressional District she was in, for the purpose of determining who she should send it to.

Q. Can you give us her address? A. Her business address is 501 Fifth Avenue. I don't know her home address.

Q. Well, it can't be 501 Fifth Avenue. That can be ascertained. A. Well, that is her business address, but I believe she was inquiring of this judge regarding her residence address.

Q. Do you know what her residence address was? A. I think it is in Brooklyn. Beyond that I don't know.

[6247]
[Tr. 723]

Q. I show you Volume I of a document that we have referred to as the Joint Appendix, at page marked at the top of the page in brackets, 258, and towards the bottom of that page there is what purports to be a reproduction of a letter on what purports to be the letterhead of World View Tours, and the letter ends over here on the top of the following page. Let me tell you the object of my showing you this. I just want to see whether this in any way refreshes your recollection as to the time when you may have been told Mr. Mansfield to do whatever you did on this subject. Now, if it does not refresh your recollection say that it does not. If it does, say it does, and tell me how it is refreshed or what is refreshed. A. Well, the only thing I can -- this doesn't refresh my memory as far as this incident. However, I did check my records on the penthouse travel service, the calls that I made on them back in --

Q. When did you do that? A. On March 6th of 1959, and March 13th of 1959, and this --

Q. And that would have been after you received instructions from Mr. Mansfield? A. That would have been after I received the instructions, and these two locations, that is, World View Tours, and Penthouse Travel, are less than two blocks

apart, so in the normal course of our duties, we call on areas rather than helterskelter around the city, so it would -- it evolved that it was around the time I made the Penthouse calls.

Q. I don't want to put words in your mouth, but in view of your answer to the question of Mr. Rett, and what you just said, it would appear that your instructions were received from Mr. Mansfield sometime between February 23 and March 6, 1959. A. Yes.

EXAMINER STODOLA: Any other questions of this witness?

If not, you are excused.

Do you have any further witnesses that you want to call? Who is the next witness?

WILLIAM J. MC DONALD

called as a witness, being duly sworn, was examined and testified as follows:

EXAMINER STODOLA: You may proceed, Mr. Royall.

DIRECT EXAMINATION

BY MR. ROYALL:

Q. Would you state your name and residence address? A. William J. McDonald, M-c-D-o-n-a-l-d, 130 Carroll Street,

[6249]
[Tr. 725]

Pearl River, New York.

Q. I believe you are now employed by American Air Lines; is that correct? A. Yes, I am.

Q. How long have you been employed by American Air Lines in the capacity of a sales representative or in sales? A. Well, in the capacity of sales for -- I mean in reservation sales, I started there in reservations, just a little over nineteen years ago.

Q. Well, maybe I can limit my question. How long have you been involved in sales where you contacted travel agents and commercial customers? A. Roughly eight years.

Q. During the years 1957, 1958 and 1959, were you aware of American Air Lines application seeking to obtain authority to fly nonstop between New York and San Francisco? A. Yes, I was aware of that.

Q. What, if anything, were you instructed to do in relation to obtaining possible, obtaining customers including travel agents, to write to their Congressmen to solicit support, if any, for American Air Lines in that connection? A. Well, I handle -- my job is to call on only travel agents, not commercial, at all; and we were merely asked if we knew of anyone that we might know would be interested in American Air Lines serving San Francisco,

[6250]
[Tr. 726]

we would ask them if they would be willing to --

Q. When --

EXAMINER STODOLA: Just a minute. He has not finished.

[BY MR. ROYALL:]

Q. Excuse me. A. Willing to support us. That is about all.

Q. When and from whom did you receive such instructions? A. The date, it is hard to say when. My boss at the time was Jimmy Mansfield, James J. Mansfield, and as I recall, -- and as I say, it is hard to pinpoint the date -- but I think it was, oh, around March, somewhere around the beginning of March, as I recall, the end of February or around March. I would say between February and April sometime; I don't know when.

Q. Of what year, sir? A. That was in 19 -- last year, 1959.

Q. Would you please state what your specific instructions were from Mr. Mansfield as to what you were to ask or request of travel agents in this connection? A. Well, he said that if we had any travel agents who felt strongly enough, thought there was another service needed out to San Francisco, and if they felt this strongly about it, perhaps they should let their representative or their Congressman know about it.

[6251]
[Tr. 727]

Q. Did he give you any other instructions as to what, if anything, you might ask the travel agent to write to the Congressmen and request his Congressman to do other than to support American's application for the service? A. Well, I have been wracking my brain trying to think. As I recall, he said if they are willing to do this, to ask them if they would go to the -- what is it? -- the testimony, or to appear before whatever it is, the Board or whatever it is, in the case of this -- is it the --

Q. Appear before whom? A. Appear before -- the body who was making the decision on this.

Q. The hearing examiner? A. Gee -- it is so long ago, I don't recall it. I don't -- I do remember him saying that if they are willing, to write to their Congressman, that they should request that he go down and see, do something about it, to support before the -- body, is it? Or the --

EXAMINER STODOLA: Are you thinking of the CAB, Civil Aeronautics Board?

THE WITNESS: It could have been the Board. I don't know, sir. I don't recall. I know he did mention something about if they feel this strongly, tell them to write to their Congressman, to their representative, have him go down and --

[6252]
[Tr. 728]

Q. What travel agencies, if any, did you contact in this connection, with this objective in mind, and if you did contact any travel agencies, in this connection, give me the name of the person with whom you discussed the matter. A. Well, I only remember one visibly that I contacted. It was American Express at 65 Broadway down here, and I spoke to a fellow down there by the name of Bob, Robert, Bob Thayer, T-h-a-y-e-r.

Q. Did you contact any other travel agents in this connection? A. Gee, I might have. I don't -- if I did, it wasn't any more than two or three, to be honest with you. I don't recall, to be perfectly honest.

Q. You would not know any of them by name, I take it? A. No, sir, I wouldn't recall any of them really. I remember Bob Thayer, though.

Q. Did you report to anyone, make a written report to anyone as to the success, or whom you had contacted in this connection? A. A written report?

Q. Yes. A. No, sir.

Q. Did you make a verbal report to Mr. Mansfield or any other official of American Air Lines as to --

[6253]
[Tr. 729]

A. Jim asked if we, did we contact them. We had so many things, we do so many things in a day that sometimes these things can slip our mind. Our sales program and so forth. As I recall, I did tell Jim that I had spoken to Bob Thayer about it.

Q. What did you tell the travel agents when you saw them, in response to Mr. Mansfield's direction in this connection? A. Well, as I recall, I spoke with Bob and asked him if he felt that there was another service needed, and he said -- we had this CAMP, well a sales program going on through our Los Angeles Gateway and they were having trouble getting space out to San Francisco to connect with Pan American, to Hawaii, and I asked Bob, "Do you think another service is necessary?"

And he said, "Yes, I believe it should be necessary."

So I said, "Gee, if you feel that strongly about it, why don't you do something about it? Why don't you maybe write to your Congressman or to your Senator or somebody down there about it and see what they can do about it. They are --"

This thing that you asked me before, I can almost -- I can't remember the exact words that Jimmy said, but he asked that the Senator or the Congressman --

[6254]
[Tr. 730]

Q. Have you ever received similar instructions to travel agents concerning any other route case in which American Air Lines had an application pending? A. No, sir, not that I recall.

Q. Had you before this occasion that we have been discussing here, had you ever before this occasion? A. No.

Q. Have you ever since? A. No, sir, I don't -- no, sir.

Q. Then it was unusual in your experience with American, is that correct?

MR. BEVANS: Unique.

A. Well, --

MR. WESTWOOD: Mr. Examiner, I think the facts speak for themselves. He said it had never been done before or since.

EXAMINER STODOLA: I think that's right, Mr. Royall. Do you have any further?

[BY MR. ROYALL:]

Q. You have been there eight years? A. I beg your pardon?

Q. You have been there eight years? A. In my present --

Q. In your present capacity? A. Yes, that's right.

MR. ROYALL: No further questions.

[6255]
[Tr. 731]

EXAMINER STODOLA: We will take a short break at this time.

(Short recess taken).

EXAMINER STODOLA: Let us be resumed.

Any cross-examination of this witness?

MR. BEVANS: I have a couple of questions, Mr. Examiner.

CROSS EXAMINATION

BY MR. BEVANS:

Q. Mr. McDonald, are you sure you did not contact any travel agents in this connection in 1957? A. No, sir, I don't think I did. No, sir.

Q. Did you ever contact Mr. Irving Goodson of the Sky Traveller Agency in Cedar Street, New York City, in this connection? A. Well, I might have. I don't recall it. That is what I say. It was so long ago, I don't recall.

Q. Do you know Mr. Goodson, Irving Goodson? A. I do know him, yes.

Q. Sky Traveller Agency? A. That's right.

Q. Did you ever call on the Downtown Travel Center at 92 Liberty Street, New York? A. Yes, I did do it.

Q. And Mr. Norman Sherman?

[6256]
[Tr. 732]

A. Yes.

Q. Do you recall discussing that matter with him? A. Gee, I might have, but I don't recall whether I did or not, Mr. Bevans, to be perfectly honest with you.

Q. Do you know a Mr. Gaul, G-a-u-l, of Yonkers, New York? A. No, sir, I don't.

Q. Do you know a Mr. Noto, N-o-t-o, of New Rochelle, New York? A. No, sir, I do not.

Q. Any calls that you made in this connection were in the area of downtown Manhattan, is that your testimony? A. Well, it could have been downtown Manhattan, but my territory is such that I have a part uptown territory, as well.

Q. Do you recall any contacts in the uptown territory? A. No, sir, I do not.

Q. Now, when you received your instructions from Mr. Mansfield, was there anyone else present that received similar instructions? A. I believe we all were there. There are four -- at that time there were four men in the department, at the time. I think we were all in a little meeting of some kind.

Q. Did that include Mr. Adamson?

[6257]
[Tr. 733]

A. No, sir, it would not.

Q. Mr. Warburton? A. No.

Q. Are they agency representative of American? A. I believe they are what is known as -- we have had a change in our organization. I think they are known as combination salesmen, where they do call on travel agents.

Q. They were not in Mr. Mansfield's department, were they? A. No, they were not.

Q. Whose department were they in? Do you know? A. Gee, as I say, we had a pretty big reorganization. I don't recall who was off, their boss, at the time.

MR. BEVANS: That is all I have. Thank you, Mr. Examiner.

EXAMINER STODOLA: Mr. Rett?

MR. RETT: No, sir.

EXAMINER STODOLA: Any other cross-examination? Do you have anything further, Mr. Royall?

MR. ROYALL: No, sir.

EXAMINER STODOLA: If there is nothing further, you are excused, sir, and thank you, sir.

(Witness excused).

[6258]
[Tr. 734]

MR. BEVANS: What is the hour?

EXAMINER STODOLA: Five after 5:00.

MR. BEVANS: If we go on to Mr. Bolan, I think we are going to take a long time.

EXAMINER STODOLA: Off the record.

(Dicussion off the record).

EXAMINER STODOLA: On the record.

Will you take the stand?

JAMES P. BOWLIN

called as a witness, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYALL:

Q. Please state your name and address, residence address.

A. James P. Bowlin, B-o-w-l-i-n, 98 Harrington Street, Bergenfield, New Jersey.

Q. I believe you are employed by American Air Lines; is that correct, sir? A. That's right, sir.

Q. How long have you been employed by American Air Lines in the sale representative capacity? A. Since November 29, 1953.

Q. During the years 1957, 1958 and 1959 were you

[6259]
[Tr. 735]

aware that American Air Lines had pending an application before the Civil Aeronautics Board to provide nonstop air service between New York and San Francisco, California? A. I was.

Q. On what occasions during those three years, if any, were you given any instructions with reference to contacting any customers or travel agents seeking to solicit such customers or travel agents to write members of the United States Congress to solicit their support in behalf of American Air Lines' application in the New York-San Francisco nonstop case? A. You said 1957, 1958 and 1959?

Q. Yes, sir, that is correct. A. Yes, I was, at one time.

Q. At one time? Could you tell us just the date or approximate date of that time? A. I would say perhaps the first part of February, 1959.

Q. Are you sure as to the year? A. I am pretty sure of the year, yes.

Q. Will you please state who gave you such instructions, who gave you instructions in this regard? A. This came up at the regular staff meeting and my boss at that time was George Smith.

[6260]
[Tr. 736]

Q. In what capacity were you working at that time? A. As an agency sales representative, calling on travel agents from South of Trenton City limits back to the New York State line.

Q. Would you please state in detail just what instructions Mr. George Smith gave you in this connection? A. Mr. Smith mentioned that, as I recall, that the case was being discussed, considered, and that we salesmen could discuss it with our customers, and if they felt that American Air Lines should enter this new route on a nonstop basis, or one-stop or two-stop, that they might wish to write to their Congressmen.

Q. Very good, sir. A. Does that answer it?

Q. Have you completed your answer? A. Yes.

Q. Thank you. What, if anything, did he suggest that if such persons desired to write their Congressmen that they should request of such Congressman or such Senator? A. That did not -- as I recall that did not enter into the picture. I remember some of my conversations with these -- with the agencies.

Q. Well, I am speaking now specifically as to what Mr. George Smith said when he gave the instructions at the

[6261]
[Tr. 737]

sales meeting? A. Well, the answer that I gave you a minute ago, that the only thing that I remember of Mr. Smith's statement, that is one topic of the usual --

Q. That is, to write the Congressman? A. Write their Congressman if they felt there was justification.

Q. What, if anything, did you do to carry out Mr. Smith's suggestion in this regard? A. Well, I perhaps, either in person or by telephone, I remember three instances with Mr. Smith where we made joint calls on travel agents, discussing the San Francisco route. In addition to those joint calls, I say there were telephone calls and personal calls.

I perhaps discussed this, as best I can remember, with maybe fifteen or twenty of the travel agents sprinkled out through New Jersey.

Q. Did you contact any travel agencies in the City of New York proper? A. No, that would be out of my territory.

Q. Did you contact the Conn Travel Agent in Morristown, New Jersey? A. Yes.

Q. Hawley Travel Agency in Somerville, New Jersey? A. It doesn't come to mind, but that was one of my agents, yes.

[6262]
[Tr. 738]

Q. Manno Travel Agency? A. Yes, I remember that; very, very much so.

Q. Rona Travel, Passaic, New Jersey? A. I remember that one, yes.

Q. Now, when you say you remember them, you mean -- A. The contact.

Q. You remember the contact? A. The discussion.

Q. Fischer Brothers in Irvington, New Jersey? A. Fischer, yes, yes.

Q. Lloyd Exchange in Union, New Jersey? A. Yes.

Q. Travelong in Elizabeth, New Jersey? A. Yes.

Q. International Travel in Paterson? A. Yes.

Q. Krugers Travel in West New York, New Jersey?

EXAMINER STODOLA: West what?

MR. ROYALL: West New York, New Jersey.

[THE WITNESS:] It is quite possible. I don't remember contacting Ernest Kruger. It is quite possible. There are eighty-eight of them. I can't pull them out of my hat.

I remember Manno. I remember Mr. Conn. I remember Mr. Manno.

[BY MR. ROYALL]

Q. What about Karoly?

[6263]
[Tr. 739]

A. Yes, there was a joint call; Smith and I talked to John Abgar, who was the owner of the organization.

Q. Paterson Travel in Paterson, New Jersey? A. I know Jim Eglington quite well, and it is quite possible I did.

Q. Travel Ways in Newark, New Jersey? A. Travel Ways in Newark, New Jersey? That one, I don't remember.

Q. Joseph M. Byrne, Byrne -- B-y-r-n-e, in Newark? A. That I don't remember.

Q. Detone Travel -- D-e-t-o-n-e Travel, in Clifton, New Jersey? A. That one I don't remember. My memory is not conveniently failing me here, but with eighty-eight of them, I really couldn't pinpoint them.

Q. Gibbs Travel in Lindhurst, New Jersey? A. That I don't remember.

Q. You don't remember? A. No.

Q. Suburban Travel of Milburn, New Jersey? A. I don't remember. I don't believe so.

Q. Teaneck Travel in Teaneck? A. I don't remember.

Q. Mangers Travel in Paterson? A. Mangers? I doubt it.

[6264]
[Tr. 740]

Q. I take it you cannot recall positively one way or the other? A. There are circumstances which would not enter into the picture here. I mean the fellow's nature is such that it is not just peculiar with me, but other airline representatives, and I doubt that I would have discussed it with him.

Q. Noto Travel? A. Who?

Q. Noto. N-o-t-o, -- A. I am not familiar --

Q. -- in New Rochelle? I beg your pardon. That is out of your territory. Strike that question.

Now, in your discussion with the persons and travel agencies that you mentioned, what, if anything, did you convey to them, and I am cognizant of what instructions you had, but I would like to know just what you did in each of these instances, or said to these people and asked them to do, if anything. A. Well, the conversation would have run much like this, as I answered you before --

EXAMINER STODOLA: Talk up a little bit. They cannot hear you.

[THE WITNESS:] (Continuing) I have been a salesman since 1953, with American Air Lines. This situation between Los Angeles

[6265]
[Tr. 741]

and San Francisco had come up many, many times. People were continually asking: "When are you going into San Francisco?" So on and so forth.

So it is quite possible the conversation's kick-off could have been, "Regarding your last comment, you are always complaining about when our one-stop, two-stop, three-stop service to San Francisco is coming up. If you think another carrier is needed in the market, or you think we should be needed in the market, why don't you write to your Senator?"

That was it.

Q. Did you give them any specific suggestions or detailed instructions as to what they should say in writing their Congressmen or Senators? A. No, sir.

Q. None whatever? A. No, sir, because I am not that familiar with the mechanism of the whole thing.

Q. Did you mention the name of Senator Case of one -- A. There are two, Senator Case and Senator Williams. We try not to have a party in American Air Lines, that is, on the street that is, and I would always say, "Senator Case or Williams, as you prefer," and not pin a man down to his politics or my politics.

Q. You would leave that to his discretion, that there

[6266]
[Tr. 742]

was a Republican and a Democrat involved, that he could take a choice? A. That's the way I always tried to be. I don't know if --

Q. You said some of these were personal contacts and some over the phone? A. Some by telephone.

Q. Do you remember which were by telephone and which in person? A. No. Really, we have many goals as sales representatives, one of which is eight or nine calls or days, which is about 2,000 people a year, which -- and I would be really crystal-gazing to try to pick that out for you. I tried to reconstruct before coming here, to reconstruct these names. You can't do it.

Q. I understand. You did talk to the Hawley Travel Agency? A. I can't swear, but it is quite possible.

Q. And you did talk to the Manno Travel Agency? A. That's right.

Q. And the Fischer Brothers, Irvington? A. I don't recall the conversation, but it is possible.

Q. And in talking to these people, as you recall, that is the substance of the conversation which was involved on your part in explaining this situation to each of them?

[6267]
[Tr. 743]

A. That's right.

Q. Of course, I don't expect you to remember verbatim, but that was the discussion? A. Mainly that thing.

Q. Did you ever receive any carbon copies of any letters that may have been written by any of these agents to Senators or Congressmen? A. Yes, I did. Mr. Kattler of Rona Travel sent me a copy of a letter he wrote to his Senator, I forget which Senator he wrote to.

Q. Did you receive any other copies that you recall? A. No, I believe that was it, unless Mr. Manno might have sent a copy. I believe one of those. I would say those two were just about --

Q. What did you do with the letter when you received it? A. I gave it to my boss, Mr. Smith.

Q. George Smith. Did you make any written reports concerning your success in contacting the travel agents? A. No. There was no written reports.

Q. Did you report verbally to Smith as to your progress or activity in this regard? A. I believe I gave him the copies that I mentioned, that I had made some calls, personal calls. Naturally he and I were on three of them, as I recall, two or three of them, together, and I don't think he would carry it any

[6268]
[Tr. 744]

further than that.

Q. At the time that you were in contact with these travel agents, do you remember the procedural stage at which the proceeding was at that time? A. No, sir. No, I don't.

Q. Were you ever advised by any one of the procedural stage at which that application was at that time? A. No, and I am not familiar with the procedural stages, as a matter of fact. All I know is what I read in the Flagship News. In other words, that this case is pending or that case is pending, and that sort of thing. I am not familiar with the mechanism.

Q. Mr. Bowlin, have you ever received before, or have you ever received since similar instructions to contact travel agents concerning any other route case in which American have had an application pending? A. No, sir.

MR. ROYALL: That is all.

EXAMINER STODOLA: Off the record.

(Discussion off the record).

EXAMINER STODOLA: On the record.

You may cross-examine, Mr. Bevans.

CROSS EXAMINATION

BY MR. BEVANS:

Q. Mr. Bowlin, referring to the Detone Travel Agency of

[6269]
[Tr. 745]

Clifton? A. I think that is probably Detone, Aldo Minicus. I don't remember talking to Aldo about this thing.

Q. Would it refresh your recollection if I asked you talked with Mr. Pampagnione? A. Joe Pampon? Well, maybe he has cut it. Joe Pampon, as I know it. If it had been discussed, I believe I would have discussed it with Aldo Minicus, the owner of the organization.

Q. What was your recollection with respect to Suburban Travel Bureau of Milburn, New Jersey? A. That I believe I said I didn't remember.

Q. That is Mrs. Lillian Dunn, isn't it? A. That's right.

Q. You don't recall asking her to write? A. No, sir, but it is possible. I don't deny it with any of them.

Q. Lloyd Exchange, did you recall? A. No, sir, I don't believe I recalled that. I know Max Peppel very well, the owner.

Q. I believe you said you do not recall having asked Joseph M.

Byrne & Co. to write. Would it refresh your recollection if I asked you whether you asked Mr. Terry? A. If I did, it would have been Joe Terry, yes. I do not know Joe Byrne too well. I just say hello. Mr. Terry is

the manager of the Travel Department.

Q. He is a former employee of American Air Lines, is he not? A. I believe he was Agency Manager for American Air Lines of New York some years ago, yes.

Q. Did you know him at that time? A. No, I didn't know Joe Terry at the time.

Q. You thought it was possible that you asked Mr. Eglington of Paterson to write. A. Very possible.

MR. BEVANS: That is all I have. Thank you, Mr. Bowlin.

EXAMINER STODOLA: Mr. Rett?

CROSS EXAMINATION

BY MR. RETT:

Q. Mr. Bowlin, you stated that you received your instructions to contact travel agents during the first part of February. How did you fix the date or the time? A. How do I fix the date or the time?

Q. How do you fix the time as the first part of February? A. Well, I received a phone call at home from Mike Kattler of Rona Travel, telling me that he had been visited by one of my competitors in connection with a letter which he had written to his Senator, and that comments were made

to the point where his boss had to step over and say that he told Mike to write the letter and that would have been somewhere in that area, and I had to back off from before the time he wrote the letter, so that is the way I am trying to pull the thing together in so far as the date is concerned.

Q. All right. Now, in the first part of February, before the 15th of February -- A. I would say somewhere in there, yes.

Q. How soon after the time you received your instructions did you start contacting these various agents that you say you did contact? A. Without losing direction in this business, you try to devote a certain part of the day to tours and a certain part of the day to going over folders and so forth. So I don't think I would have devoted a whole day to it. I would say during a period of maybe three or four days I would make these contacts or maybe more than three or four days. I don't know the span. I would not want to guess at it, but we wouldn't refer to it as a sales blitz or anything like that. It certainly did not happen that way.

Q. In any event, it happened very promptly after you received your instructions? A. Yes, sir.

MR. RETT: That is all I have.

[6272]
[Tr. 748]

EXAMINER STODOLA: Mr. Westwood?

MR. WESTWOOD: No, sir.

EXAMINER STODOLA: Any redirect?

REDIRECT EXAMINATION

BY MR. ROYALL:

Q. Mr. Bowlin, didn't you testify when I was talking to you that you received a copy of a letter that Rona Travel Service had written to Senator Case? A. Yes, I believe I did.

Q. Well, I show you that letter here, dated February 17, 1959. A. Well, I suppose you are referring to a copy, James P. Bowlin on here, an open copy.

Q. I am not referring to a thing. I am just referring to that letter right there. A. Why wouldn't I have been able to receive a copy, sir?

Q. I believe you stated that you did. A. That's right. Why wouldn't I have been able to receive it?

Q. Well, as I understand it, your contact was prior to that? A. That's right.

Q. Your contact with Rona? A. Yes, and the man wrote the letter after.

Q. How soon after that letter was written did you get a copy, do you recall? A. It could not have been more than a few days.

Q. Well, didn't you just now testify that when you first knew it had been written was when you received a call from Kattler on the phone? A. I told you I got a copy of the letter.

Q. Yes. A. This gentleman down here, I believe, asked me how I established the dates in my mind. I told him, I intended to say the thing that stood out most in my mind was the call from Kattler regarding the visit that he had had from a competitor, talking about this particular letter.

Q. That then is the letter you were referring to that was written to Case? A. That'r right.

MR. ROYAL: Nothing further.

EXAMINER STODOLA: If there is nothing further, you are excused, and thank you for your testimony.

(Witness excused).

EXAMINER STODOLA: We will recess now until 9:30 a.m. tomorrow, in the Empire Room.

(Whereupon, the hearing was adjourned to the Empire Room of the Statler Hotel, New York City, at 9:30 a.m., Friday, July 22, 1960).

[6274]

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July 22, 1960

* * * * *

[6277]
[Tr. 751]

Whereupon,

WALLACE GRANT HAWLEY, JR.,

called as a witness, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYALL:

* * * * *

[6282]
[Tr. 756]

Q. What was the substance of that letter that you wrote to Senator Case? Do you recall? A. I do not recall the phraseology.

Q. But in essence what if anything did you request the Senator to do? A. Nothing more than to suggest that he look favorably upon the nonstop service of American Airlines. I sent a note along on it.

Q. How long have you been in the travel agency business, Mr. Hawley? A. Since September 17, 1932.

Q. Had American Airlines prior to that time or has it subsequent to that time ever made a request to you that you write to your representative or representatives in Congress to support a route application which they may be seeking? A. Not to my knowledge. That is, I don't recall them ever coming in and requesting my support.

* * * * *

[6297]
[Tr. 770]

Whereupon,

GORDON B. MARSH

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYALL:

* * * * *

[6299]
[Tr. 772]

Q. Were you contacted at any time by American Airlines' representatives other than the one you have just detailed in 1957 relating to that application of American? A. Not that I can recall. As I say, I recall the call, and I had thought it was not that long ago, but in the course of business and the calls we get, I don't know, but I don't recall being asked for them any other time than the one time, to send a letter for the purpose of establishing a route. We have had other calls from them, of course.

Q. Had you before the time mentioned in 1957 or since that time been requested by American Airlines to support it in any other route applications? A. No, no, I have not.

Q. Have you ever been contacted by any other airlines since you had your agency? A. Not to the best of my knowledge.

Q. To support a route application by any particular carrier? A. No. That is the only one that I recall we had.

MR. ROYALL: That is all.

* * * * *

[6302]
[Tr. 775]

Whereupon,

WALTER BARNHORST

was called as a witness and having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYALL:

* * * * *

[6306]
[Tr. 779]

Q. Had you ever been requested by American Airlines before to lend support to an application of theirs for a route? A. No, sir.

Q. Or after? A. No, sir. Not prior to that time. After that time I don't think they would ask me because he knows I wouldn't stand on that point.

Q. Did you ever write any letter for any other airline in support of such an application? A. No, sir. Taxes on route.

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[6324]

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* * * * *

[6344]
[Tr. 814]

Whereupon,

MORRIS SHIPLEY,

called as a witness and, having been first duly sworn, was examined and testified as follows:

MR. HUISENTRUIT: Mr. Examiner, I would renew our request made earlier that all American Airline witnesses be considered as hostile witnesses?

EXAMINER STODOLA: Very well.

DIRECT EXAMINATION

BY MR. HUISENTRUIT:

Q. Will you please state your full name and address? A. My name is Morris Shipley, M-o-r-r-i-s, S-h-i-p-l-e-y. My residence address is Palmer Hill Road, Old Greenwich, Connecticut. My business address is 100 Park Avenue, New York City.

Q. From the period January 1957 to the present time, would you please tell us by whom you were employed, the position you held, your place of employment, and the dates? A. During all of that period I was employed by American Airlines. For the period of January 1957 to approximately June of 1958 I was based in Washington, D. C., in charge of the Washington Affairs Office.

Subsequently, and to the present time, I have been based in New York in charge of the State and Community Affairs Department.

Q. Did you have any formal title when you were in the Washington Office until June of 1958? A. My title during all of this period has been Assistant Vice President.

Q. Of the Community Affairs, or was there an extra title? A. During the period from January 1957 to approximately June of 1958 I held the title of Assistant Vice-President, Washington Affairs. Subsequently, and to the present time, my title has been Assistant Vice-President, State and Community Affairs.

Q. Mr. Shipley, could you tell us who your superior was during this period of time, and to whom you reported? A. During all of this period I reported to C. W. Jacob, Senior Vice-President, American Airlines.

Q. During the period you were in the Washington Office until June of 1958, who were your employees, or who reported to you? A. There was Mr. Dwight D. Taylor, Mr. Charles L. Strickler and Mr. Lionel Rogers. There is another man, and his name is on the tip of my tongue, but I can't think of it now. He is based out here in San Francisco.

* * * * *

Q. Have you contacted any travel agencies or agents in either New York or California concerning this case? A. I have not.

Q. Were you aware that travel agents were being contacted

by American Airlines' personnel? A. In the New York area in 1959 I was aware of it, yes, sir.

Q. How did you become aware of that? A. I asked them to make some contacts.

Q. Did anybody tell you to ask them? A. Yes, sir.

Q. Pardon? A. Yes, sir, they did.

Q. Who asked you? A. Mr. Dwight Taylor, in a telephone conversation.

Q. Do you recall the approximate date of this telephone conversation? A. I don't think that I can tell you the date. I believe it was sometime early in 1959.

Q. What did Mr. Taylor ask you to do? A. As I recollect it, Mr. Taylor said that he had been talking with some congressmen, and they had indicated that it would be helpful to them if there was some expression from their constituents, and he asked if this would be possible. I said I would see what I could do.

Q. Did you get the impression that the congressmen wanted this support before they would in turn support American as a third carrier? A. My impression and my recollection are that Mr. Taylor

[6402]
[Tr. 872]

was asking me this for the purpose of appearance at oral agrument.

Q. And what did you do after this telephone conversation with Mr. Taylor? A. I subsequently telephoned the district sales manager in New York.

Q. What was his name? A. I believe it is Andrew B. Newcomb.

Q. What did you tell Mr. Newcomb? A. I asked if it would be possible for some of the sales representatives in their contacts to do this, and he asked if I would talk directly with Mr. Bob Smith, which I did.

Q. When did this call to them take place; was it within a day or two after you had that call from Mr. Taylor? A. I can't be sure. I think it would have been reasonably close to Mr. Taylor's call.

Q. Then after your conversation with Mr. Newcomb what did you do? A. I called Mr. Bob Smith.

Q. Was this the same day you called Mr. Newcomb? A. I think it probably was, and I have a vague recollection he said that Bob Smith was there, and handed the telephone to Bob Smith, and I really made my request to Mr. Smith directly.

Q. Could you tell me the -- you said in early 1959.

[6403]
[Tr. 873]

Could you tell me the month that this took place? A. (No response.)

Q. To refresh your recollection, I believe that American had an airplane accident in February of 1959. Was it before the accident? A. I can't be sure, but I would -- I am really guessing, but I think it was probably after the accident.

Q. Was it after the latter part of the month, the latter part of February? A. I can't be sure.

Q. It wouldn't have been later than March, would it have been? A. Well, my impression is that it was sometime early in 1959, but I can't be sure of the time exactly.

Q. What did you tell Mr. Smith to do? A. I asked Mr. Smith if it would be possible for the sales resprsentatives in their normal course of their contacts with users of air transportation, for the purpose of expressing an interest in the appearance of their congressman at oral argument, I asked him if they would be willing to write their congressman to that effect.

Q. Did you know there was going to be oral argument at that time? A. Certainly I knew there was going to be oral argument. There always is, isn't there?

[6404]
[Tr. 874]

Q. Was the Examiner's initial decision out at that time? A. I don't recall, but certainly we were expecting it if it wasn't out already.

Q. Did you tell Mr. Smith what the contents of these letters should be? A. No, sir, I did not.

Q. And did Mr. Smith report to you after you had given these instructions, as to whether he had carried them out? A. I don't recall hearing from Mr. Smith again until sometime in the summer of 1959. He called me about a letter that they had received from a travel agent who had written, I believe, to a congressman.

Q. Were you in any way kept informed of contacts that were made as a result of your instructions? A. No, sir, I was not.

Q. Do you specifically recall, Mr. Shipley, that you requested these -- that you told Mr. Smith that those travel agents should request their congressman to appear at oral argument, or is it possible you merely sought travel agents to support a third carrier, or American

Airlines? A. First of all I don't think I mentioned travel agents or necessarily thinking about travel agents. I think I asked Mr. Smith in the normal course of his representatives -- in the normal course of their calling, if they would do this.

Q. Who do they call on, in addition to the travel agents;

[6405]
[Tr. 875]

is that the bulk of their calls? A. No, sir, I would not think so.

Q. Large corporations? A. Any user of air transportation.

Q. And then back to my question. Is it possible that you merely told Mr. Smith that he should seek support for a third carrier, or for American Airlines in this case? A. My best recollection is that I asked Mr. Smith whether any of these people were willing to ask their congressman to appear at oral argument and, if so, to write them to that effect.

Q. Do you know whether anybody other than travel agents wrote to their congressman supporting oral argument? A. I do not.

Q. Pardon me? A. I do not, no.

MR. HUISENTRUIT: Mr. Examiner, I would like to have marked for identification a two-page letter dated January 30, 1959, addressed to Mr. Thomas J. Mellon, and purportedly sent by Morris Shipley.

EXAMINER STODOLA: The letter will be marked as Exhibit BOE-23.

(The document above referred to was marked Exhibit No. BOE 23 for identification.)

[6406]
[Tr. 876]

BY MR. HUISENTRUIT:

Q. Mr. Shipley, will you read that letter to yourself and familiarize yourself with it.

(Short pause.)

Have you read it? A. Yes, sir.

Q. Do you recall sending that letter? A. Yes, sir.

Q. I call your attention to that last full paragraph on the first page. You state there that you are "at a loss to understand the reasons for the continuing delays in the C. A.B. proceeding." A. Yes, sir.

Q. And that there is an indication that the Examiner's initial decision will not be issued for another month or two, and that it is difficult to escape the conclusion that the delays were directed from the Commission itself. A. Yes, sir.

Q. By "Commission itself," are you referring to the Civil Aeronautics Board? A. Yes, sir.

Q. You further state that, "if this is true San Francisco is being miserably discriminated against." A. Yes, sir.

Q. Mr. Shipley, have you tried to disseminate the

[Tr. 877]
[6407]

impression to the people of California that the Civil Aeronautics Board was intentionally delaying this case? A. No, sir.

Q. What is the basis for the conclusion in your letter that the Board itself is responsible for the delays? A. This letter was written in response to a querie of Mr. Mellon whom I considered a good friend. The statements therein were my best judgment, and were related in candor to a personal friend.

Q. You must have had some reason or basis for saying that the Board is responsible for the delays. What made you think that? A. Well, first of all, Mr. Huisentruit, our motion to expedite had been filed in May of '57. The Board denied this motion in July, I think, or June or July -- June, it was, and ordered a staff study.

It wasn't until January of '58 that the Board issued an order setting down this matter for hearing. This the Board did on an expedited basis and used the language, "Expedited."

To my mind and in my judgment this was a simply though important case. It involved only one segment, one other carrier, and it seemed to me that it was taking an unduly long time.

Q. The only basis for your belief that the Board was intentionally delaying the proceeding was the fact that the

[6408]
[Tr. 878]

dates were farther apart than you had hoped? Was that the only basis? A. Well, for example, after the issuance of the January order, as I recall there were petitions for reconsideration filed by TWA and United. These were not disposed of for some two or three months later, and there was no pre-hearing conference held while these were pending, but --

Q. But other than the fact that these dates were farther apart than you thought they should be, was there any basis for your saying that the Board was intentionally delaying the case? A. Well, these matters were at the discretion of the Board. They were Board action. I was simply --

EXAMINER STODOLA: Well, Mr. Shipley, let's stop there.

Have you ever heard of a case where the Board interfered with the Examiner's decision, the writing thereof or the release of?

THE WITNESS: No, sir, and I didn't believe I had so testified here.

* * * * *

[6434]
[Tr. 904]

[BY MR. HUISENTRUIT:]

Q. What type of assistance do you render them?

[6435]
[Tr. 905]

A. Well, it is common practice among the airlines in route cases for the carriers to ask for the support of a community in behalf of their own application.

Frequently, in doing that, you will submit data, thoughts or ideas to the community.

Q. Would this assistance come in the form of a brief? A. It could, yes, sir.

Q. Or other pleadings? A. Yes, sir, it could.

Q. Which would be prepared by American, but filed under the name of the city or civic organization? A. Well, usually I think the practice among the airlines is that --

Q. I am just speaking about American, to your knowledge, to your knowledge. A. Well, this is not common just to --

Q. No. A. Not something which American only does. This is done by all air carriers.

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[6448]
[Tr. 918]

CROSS EXAMINATION

* * * * *

[6461]
[Tr. 931]

BY MR. BERNSTEIN:

* * * * *

[6468]
[Tr. 938]

Q. Mr. Shipley, is it usual or ordinary in the regular course of your functions with American to make contacts with legislators as you did in this proceeding? Have you done so in similar proceedings in other route cases, or was this a unique experience for you? A. Well, as I answered the question of Mr. Bevans, because of the substantial time that I spent in Washington I did have some acquaintance on Capitol Hill, but this has never been a specific assignment for me.

My activities up there were minor. I don't recall my contacting any congressman in any other proceedings, but I may well have.

MR. BERNSTEIN: That is all I have.

* * * * *

[6476]
[Tr. 946]

BY MR. WESTWOOD:

Q. Mr. Shipley, you recall this morning I believe, in answer to a question by the Examiner, that you stated that American employees might or would be in contact with a congressman if the occasion arose, indicate to the congressman that a letter concerning a route matter might be written, might properly be written by the Congressman to the Board in appropriate circumstances.

Is that a fair paraphrase of what you said? A. I think it is, yes, sir.

Q. Now, what did you mean by appropriate circumstances in giving that answer? I am not asking you as a matter of law.

[6477]
[Tr. 947]

I am just asking you what your understanding of appropriate circumstances was.

MR. BEVANS: Mr. Examiner, this is asking the witness to give a legal interpretation. Otherwise, it adds absolutely nothing to the record.

EXAMINER STODOLA: Well, let's see what the witness's answer is.

A. Well, maybe I can best answer it by some examples of what I have in mind.

First of all, when there is no formal matter pending which has to be decided after a Notice of Hearing, I believe it is all right then for a congressman to write the Board asking for expedition of a case.

I think it is also quite proper for a congressman during the pendancy of a case to make an inquiry about status of [or] a procedural matter.

I believe it is further appropriate for a congressman during the pendancy of a case to write a letter to the Board in lieu of oral argument?

BY MR. WESTWOOD:

Q. Now, is that what you meant by appropriate circumstance?

A. Yes, sir.

* * * * *

[6484]

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August 16, 1960

* * * * *

[6535]
[Tr. 1003]

Whereupon,

ALFRED R. BONE,

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUISENTRUIT:

Q. Will you please state your full name and address? A. Alfred R. Bone, B-o-n-e, Jr. Home address is 399 Moresque Drive, Pasadena, California.

Q. Mr. Bone, by whom were you employed from January 1957 to September 1, 1958? A. American Airlines.

Q. I would like you to give me the name of the company, the position held, the dates, and the place of employment. A. American Airlines, Inc., for something more than 30 years.

During the period 1946 until February 1, 1960, I was Regional Vice President.

Q. And where were you located? A. Headquartered in Los Angeles.

* * * * *

[6573]
[Tr. 1041]

Q. In the first page of that Exhibit 29 you stated: "In line with our discussions about getting better established with the top people in San Francisco . . ." when did this discussion with Mr. Shipley take place that you are referring to in this memo? A. I used the word "discussions", plural.

Q. Yes. A. I referred to discussions not only with Mr. Shipley but with Mr. Jacob and Mr. Rheinstrom and many other officials of the company.

This was based upon the fact that at this time we were getting about five to seven per cent of the traffic out of San Francisco whereas our principal competitors were getting about 50 per cent of the traffic out of San Francisco.

Q. Pardon me, could you please tell me what date you are referring to there? A. The dates of the discussions?

Q. Yes.

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[6601]
[Tr. 1069]

CROSS EXAMINATION

* * * * *

[6611]
[Tr. 1079]

BY MR. WESTWOOD:

Q. Mr. Bone, have you Exhibit BOE-29? A. Yes.

Q. This is a memorandum from you to Mr. Shipley dated June 25, 1958, to which are attached two copies of two editorials.

Now, in the last paragraph -- I am not referring to the PS at the bottom of the page but in the last paragraph of the body of the memorandum, you refer to a discussion at the sales council meeting in New York the other week.

Will you tell us just a little bit more about the substance of that discussion; what it was, what the point was? A. My headquarters were in Los Angeles but my responsibility covers the Western Region which includes San Francisco and Oakland.

Our position in Los Angeles, competitively speaking in terms of traffic, was very strong. In San Francisco it is very weak.

We were doing about six or seven per cent of the total volume of air travel out of San Francisco.

Q. I understand that. I want to get to the discussion; what was the discussion at the sales council meeting? A. The discussion was that the officers of the company including myself should devote more attention to specifically San Francisco and other non-regional or non-general office

headquarters where we needed support.

Q. Where you needed support for what purpose? A. Traffic, for getting business.

Q. Now, in the P. S. to this memorandum, you refer to the attached editorials saying, that they were a direct consequence of the conversation at the luncheon.

What do you mean by that; how were these editorials the consequence of the conversation at the luncheon? A. By coincidence, the word of a postponement in the hearing was made known at the luncheon. I think it was stated by Mr. Needles.

It is my impression that Mr. Needles and Mr. Holm, as well as those from American Airlines that were present at the luncheon, everyone was very disappointed about the prospect of delay.

We expressed our disappointment. There were some newspapermen there who were also interested in improved air service for San Francisco. Without any request on the part of anyone I believe that news articles and editorials were the consequence of the conversation at the luncheon.

Q. Now, were these editorials based on something you said at the luncheon? A. No.

Q. Were they based on anything that any of the other American Airlines people said?

[6613]
[Tr. 1081]

A. No. I think they were based on the things that Mr. Needles brought to the luncheon.

Q. Do you, in fact, know what they were based on? A. My opinion and observation is that they were based upon the news that Mr. Needles brought to the luncheon, that is, that there was a postponement in the hearing.

Q. Did you suggest editorials on the subject? A. No.

Q. Did anyone else from American Airlines at the luncheon suggest editorials? A. No.

Q. Do you know of anyone in connection with American Airlines who was not at the luncheon who suggested these editorials? A. No.

Q. Did anybody in American Airlines have anything to do with these editorials? A. Not that I know of.

* * * * *

[6798]

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August 18, 1960

* * * * *

[6802]
[Tr. 1266]

Whereupon,

THOMAS W. BARBOUR

called as a witness, having been first duly sworn, was examined and testified as follows:

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[6803]
[Tr. 1267]

DIRECT EXAMINATION

BY MR. HUISENTRUIT:

* * * * *

[6805]
[Tr. 1269]

Q. Would you please tell us the positions or jobs you have held with American Airlines and the city in which you were located? A. I have always been stationed in San Francisco. My first title was public relations representative and later manager of public relations for San Francisco. At the present time, I am director of the Northern California Bureau, American Airlines Public Relations Department.

* * * * *

[6816]
[Tr. 1280]

Q. When was this general understanding reached prior to this first initial meeting of Mr. Strickler in early '57? A. Well, I would guess that an understanding of my role

[6817]
[Tr. 1281]

in connection with any -- well, in connection with any American Airline route development plan, came out of my activity in the Denver Service Case.

Q. Did you have continuing instructions from way back in '54, Mr. Barbour? A. Actually, I didn't get any instructions in the Denver Service program, either.

Q. Well, then, what was your understanding of what you were supposed to do? A. Perhaps I should explain how I got into this business of, route development business, and it goes way back to the early stages of the Denver Service Case when Dick Fisher, who was then the American Community Relations Director in New York, came out, and he said, "Here are some, here are our exhibits in the Denver Service Case."

And he said, "You probably -- this is too complicated, too involved and too dull, and you probably wouldn't be interested in it, but I thought you would like to read it anyway."

And I did read it, and as I told you, I had just come from a Metropolitan News desk over to American Airlines, and it was perfectly obvious to me in reading this document that it was not dull, it would not be dull if it was properly brought to the attention of the community, that it was important, that it was important to American Airlines, that it was

important to the City, in fact to all of Northern California, the action that American Airlines proposed to take in the Denver Service Case, and it was what you might call a heavensent opportunity to present to the City an action by my company that had civic improvement and civic virtue and public progress and advancement written all over it.

And it would be obviously to the advantage of my company for me to call this action to the attention of as many people as possible, so that they would know that American Airlines was in line with the growth and development of the West, and was actually trying to do something about it, and we were proud --

Q. Mr. Barbour -- A. -- of what we were going to do, and there was no point at all in hiding what we were doing in this Denver Service Case.

And the results were exactly as I had anticipated. There was interest in it. The response on the part of the press and other people was immediate and emphatic.

* * * * *

[6821]
[Tr. 1285]

Q. And then you went on to describe what you had done in the past. On the basis of that, would it be a fair assumption that your role in this case would be to take the various pleadings and exhibits which American Airlines might file and summarize these for the newspapers? A. I wouldn't say that was my basic role, no. This was a service that I would try to perform as the apparent need arose, because I knew that -- well, I knew that whatever you sent a newspaper had to have some relationship with news events,

[6822]
[Tr. 1286]

and I tried to tie them in with these procedural steps as they would take place.

It could be anticipated that I would get calls from the newspapers. In fact, I did get many calls from the newspapers asking what this was all about.

What are you going to do, and I would get up those memos to anticipate the need for this information before I would get the calls because chronically we would get new reporters on the stories, and it would take a long time on the telephone for me to explain the procedural steps in the case and what the role of the Civil Aeronautics Board was, what American Airlines was trying to do, why we had oppositions to something which was obviously in the public benefit.

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[6942]
[Tr. 1406]

CROSS EXAMINATION

*   *   *   *   *

[6963]
[Tr. 1427]

BY MR. WESTWOOD:

*   *   *   *   *

Q. In your testimony, you stated, as I recall it, that you prepared a memorandum to editors or something of that nature in connection with the exhibits of American in the Denver Service Case, and I believe you said that it took you about three hours or something of that sort. A. Yes.

Q. To do that work? A. Yes.

Q. And to prepare that memorandum? A. Yes.

Q. Now, will you explain just in some detail -- you don't have to make a long speech, but tell us just how you could accomplish such a job in what seems to be a relatively short period of time.

What did you do? A. Well, just -- I would get the brief and read through the brief of which, or the exhibits and I believe that the briefs contain a rather substantial subheadings --

Q. You mean the exhibits? A. Each -- I mean the exhibits.

These exhibits would have rather lengthy subheadings which are almost a complete statement of the whole, of that

[6964]
[Tr. 1428]

portion of the exhibit so that all you'd have to do is write down the substance of the subheading.

Q. And is that approximately what your memorandum to editors in connection with the exhibits in the Denver Service Case involved? A. Pretty substantially, yes.

If you will notice some of the later exhibits, you will find that I not only analyzed our own but United's and TWA's as well.

I received no compliments on that score.

(Laughter)

Q. And --

EXAMINER STODOLA: Off the record.

(Remarks off the record.)

EXAMINER STODOLA: On the record.

BY MR. WESTWOOD:

Q. Now, in your reference to some of the exhibits in this case, are you referring to BOE-59, which is a memorandum to editors which is dated July 14, 1958? A. Yes, sir.

Q. Now, in the preparation of that memorandum, did you examine the exhibits of American and of TWA and of United? A. Yes, sir.

Q. And prepared that substantially in the way you indicated you prepared the memoranda to editors in the Denver

[6965]
[Tr. 1429]

Service Case, is that right? A. Yes, sir.

* * * * *

[7155]

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August 22, 1960

* * * * *

[7174]
[Tr. 1634]

Whereupon,

THOMAS GRAY,

was called as a witness and being first duly sworn, was examined and testified as follows:

EXAMINER STODOLA: Take the stand, please.

DIRECT EXAMINATION

BY MR. ROYALL:

Q. Please state your name and address, sir. A. Thomas Gray; my resident address is 3954 Washington Street, San Francisco.

Q. Are you employed -- what is your employment, Mr. Gray? A. I am the general manager of the Downtown Association of San Francisco.

* * * * *

[7191]
[Tr. 1651]

Q. Did you advise anyone in American Airlines that this Downtown Association would consider such a motion prior to its passage? A. Certainly.

Q. Who did you advise of that? A. We advised all the parties that we were going to take up a matter of interest to them. I think all the principals in this case were members of the Downtown Association.

Q. Well, you speak of principles, who do you mean? A. TWA, United and American.

I think United was a member of the Downtown Association Board.

* * * * *

[7212]
[Tr. 1672]

Whereupon,

ALBERT SCHLESINGER,

called as a witness and, having been previously duly sworn, was examined and testified as follows:

* * * * *

[7213]
[Tr. 1673]

DIRECT EXAMINATION

BY MR. ROYALL:

Q. Would you please state your name and address, please?
A. Albert Schlesinger, 2690 Broadway in San Francisco.

Q. I believe that you have been associated with the Downtown Association of San Francisco for some time, sir. Are you now a member of that organization? A. I am.

Q. Have you served in a fixed capacity with that organization, that is, president or -- A. I have served as president for two years.

* * * * *

[7233]
[Tr. 1693]

CROSS EXAMINATION

BY MR. HARVEY:

* * * * *

[7238]
[Tr. 1698]

BY MR. HOLM:

* * * * *

Q. You devote all of your time and you devoted all of those years and all of those efforts and now you are engaged in the Pacific Festival for the City and throughout these other years engaged in other things that involved the welfare of the people of the City, drives for funds for charities and things of that

[7239]
[Tr. 1699]

nature, is that correct? A. Well, I am now on six or eight various boards of directors and philanthropic organizations. I think what you are trying to ask me, Mr. Holm, is that in so far as any economical or personal interest in this case, I might say that I am a stockholder of TWA and my friendship is greater with the executives in the offices of United Air Lines and that all of them are very good to me in supporting me on these various activities that I pursue.

My only objective in this case was to serve the City of San Francisco in what I felt was of interest to the City of San Francisco based on personal experience, travel to New York four or five times a year and I might add this as a parting conclusion.

* * * * *

Whereupon,

CHARLES C. MILLER,

was called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYALL:

Q. Please state your name and residence. A. Charles C. Miller, 427 Lagunitas Avenue, Oakland, California.

Q. Mr. Miller, I believe you have been associated with the San Francisco Chamber of Commerce, have you not? A. Yes, sir.

Q. In what capacity, sir,and for what period of time? A. As a member of the transportation department since 1955.

Q. Continuously until this date, is that correct? A. That is correct.

* * * * *

[7263]
[Tr. 1723]

Whereas,

FRANCIS McCARTY

called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUISENTRUIT:

Q. Your Honor, will you please state your name and

[7264]
[Tr. 1724]

address? A. Francis McCarty, 3234 Divisidero Street, San Francisco.

Q. Will you please tell us from January 1957 to September 1959, if you were in any way associated with the City and County Government of San Francisco? A. Yes.

Q. And what position did you hold, sir? A. I was a member of the Board of Supervisors and I believe it was in January of 1958 that I was elected president.

Q. Were you a member of the Board of Supervisors in 1957 also? A. Yes, sir.

Q. And you continued as a member through September of 1959? A. No, until the early part of February of 1959.

* * * * *

[7266]
[Tr. 1726]

Q. Had you expressed your opinion on the resolution prior to this meeting to anyone in the city government? A. I don't recall that. I may have.

The position -- I was on the Board since early in 1952 and until I was elected president among other committee assignments, I was chairman of the Public Utility Committee which had jurisdiction on matters involving the airport, the municipal railway and the water development.

The position of the Board during all those years was to favor all applications for expanded air service, no matter by whom made. That was the position of the Board.

Q. And regardless of what points were involved, is that correct? A. Correct. We felt that San Francisco needed more air service and the air lines were rather familiar with our position on it.

In one instance, our position would be antagonistic to a given air line. On another, it would be favorable to it, depending on the position of the air line, but our position was always the same. We favored expanded service.

* * * * *

[7273]
[Tr. 1733]

CHARLES C. MILLER

called as a witness, and having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION - - RESUMED

BY MR. ROYALL:

* * * * *

[7283]
[Tr. 1743]

Q. Did the Chamber of Commerce write any congressman from the State of California relating to this? A. Yes. After the presentation by the carriers, both for and against an expedited hearing, was held by the Chamber's transportation committee, and the committee voted to support the expedited hearing, and the Board of Directors approved the committee's recommendation, I prepared a letter for our president who at that time was Mr. Maloney, that is, 1957, how the Board, supporting an expedited hearing and pointing out that the support of an expedited hearing had no, should be in no way taken as supporting a particular carrier.

Following the standard procedure of Chamber operations in all types of matters of this kind, we sent copies to our congressmen and senators advising them of our position in the matter, and enlisting their support.

So we sent copies of those letters to Senator, the two Senators from California, and the congressmen from the Bay

[7284]
[Tr. 1744]

Area.

Q. Did you discuss with Mr. Needles or Mr. Strickler the fact that the Chamber was sending copies of your resolution, together with a letter requesting congressional senatorial support of your Washington representatives, that is, the congressmen and senators? A. In the first place, we did not have a resolution. We simply had our Board of Directors approve the action of the Committee, which was recommended that the Chamber support that, an expedited hearing without carrier preference, without specifying a carrier.

United and TWA, American, Western, Pan American, all have representatives on the committee.

United has a representative on the Board of Directors, or at that time had, and it has always been the practice in cases of this kind to, for information purposes, to advise our congressmen how -- now, it is quite possible that I did advise Mr. Strickler when the Board approves our action that these letters had gone out to the senators and congressmen.

* * * * *

[7314]
[Tr. 1774]

Q. From your answers to preceding questions, and I want to understand you and not misquote you, it is my recollection that you did not feel that communications sent by your Chamber of Commerce, the

San Francisco Chamber of Commerce, or other Chambers of Commerce was required to be filed with the Civil Aeronautics Board with an original and 19 copies as you apparently feel that statement under Rule 14 should be filed.

EXAMINER STODOLA: Now, are you speaking of communications to the Board?

MR. ROYALL: Yes, sir.

EXAMINER STODOLA: During the year 1957, for instance?

MR. ROYALL: Yes, sir.

EXAMINER STODOLA: Mr. Miller?

A. I again go back to the answer that I have said twice before and that was this, sir: That in 1957, we did not feel there was any party to the action or any case before the Board.

In that instance, it is entirely different than after the case has been set down for hearing by the Board. The case had already gone to hearing by the Board and there was a case before the Board in that instance and all other instances where there is a proceeding, the rules of procedure must be followed.

Q. Well, then did you, do you feel that simply because American filed a motion that there are -- that at such a time there were no rules of the Board which precluded a Chamber of Commerce from sending one copy to the Board or any number of copies or communicating or sending copies of that resolution to Congressmen instead of sending them to the Board? A. Again, it was my understanding that there was no case before the Board.

Q. Then you felt that -- A. Then there was -- then a letter to the chairman of the Board was in order without the complicated rules of procedure if the hearing had been set and there was a case before the Board.

Q. Did anybody tell you that there was no case pending at that time in 1957? A. Before the Board ruled on whether the, on the expedited hearing?

[7316]
[Tr. 1776]

Q. Yes, sir. A. I don't believe so. I think it was my opinion and the City Attorney's that that was the situation.

* * * * *

[7318]
[Tr. 1778]

CROSS EXAMINATION

* * * * *

[7339]

BY MR. WESTWOOD:

Q. Mr. Miller, I show you a document consisting of two pages, which has been marked for identification BOE-73, and I invite your attention to page 2 of that document.

Now, I believe I understood your testimony to be that copies of that page were given to a number of people, among others, I believe, the City Attorney's Office, and someone from American Airlines, is that right? A. That is right.

Q. Were copies also given to representatives of TWA and United? A. I believe they were. In my recollection they were.

[7340]
[Tr. 1799]

Q. And that would include, the copies given to them would include the notations at the bottom, that is, that copies of this letter had been sent to these senators and members of Congress? A. Yes, sir.

* * * * *

[7353]

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[7375]
[Tr. 1832]

Whereupon,

JOSEPH W. MARTIN, JR.

was called as a witness and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUISENTRUIT:

Q. Will you please state your name and address, sir? A. Joseph Martin, Jr., 11 Presidio Terrace, San Francisco, California.

Q. Will you please tell us your position with the City and County of San Francisco from January 11, 1957 to September

[7376]
[Tr. 1833]

of 1959? A. Well, on January 15, 1956, I was appointed to the Public Utilities Commission by Mayor Christopher.

I became president on that day.

In January, around the 20th, of '58, I resigned as president, but stayed a member of the Commission.

In January of this year I became president of the Commission again, and I have just resigned from the Commission, although I don't know whether or not my resignation is effective but, anyway, as far as I am concerned I have resigned.

Q. Mr. Martin, may I refer you to page 240, of Volume 1 of the Joint Appendix? That is the bracketed number 240, I am sorry. I must have made a mistake. 398, the bracketed number 398. A. Yes, sir.

Q. I ask you to read that to yourself and familiarize yourself with it. A. Yes, sir.

Q. Mr. Martin, will you tell us who suggested that this resolution be passed? A. Well, I don't know that I can answer that question. We suggested it be passed. If you would like me to give you my recollection of how, of the events leading up to this resolution, I will be very happy to do so, if that is what you want.

Q. Yes. Will you, please? A. Shortly after I was appointed to the Commission in 1956, I was contacted by somebody in American Airlines. I don't remember who. It may have been Tom Barbour; it may have been the gentleman who was the head of American at that time in the area, saying that they had something that they wanted to present to the Commission, and to familiarize me with.

I told them that the Commission ate lunch at Jack's Restaurant every Tuesday before the meeting, and if they wanted to come up they could present it to the whole Commission informally.

They did come up. They brought with them a stencilled memorandum, and it outlined the need that San Francisco had for a third nonstop carrier.

Now, I was quite new on the Commission, and the whole matter was unfamiliar to me. I had heard generally of the Denver Service Case, but I didn't know very much about it.

I told them that, and we all told them that this looked interesting, and would they come out to the Commission next week and formally present it in public.

They did this, and they presented the same memorandum that they gave us to the Commission and the press the next week. We discussed the matter, and it was obviously the concensus of the entire Commission, that in our opinion the Board had erred in the Denver Service Case in not following

[7378]
[Tr. 1835]

the Examiner's recommendation, giving us the third nonstop that this area needed and we felt was entitled to, but we didn't know exactly what to do about it.

The Denver Service Case was still new and hot, and the Board decision had barely come down, and the matter sort of ended there.

The next step, as I recollect, was that sometime in the summer of that year --

Q. What year are you speaking of? A. This is 1956. The Commission established a policy of what it wished to do and accomplish. Commissioner Del Carlo and I were appointees of the Mayor, Mayor Christopher, that is, and we just -- I had just become generally familiar with the work and the various properties of the Commission, and we felt that it would give a little more purpose to our activity if we set down various aims for ourselves. These aims were in all of the departments, the Hetch-Hetchy, the water, the Muni and the Airport.

One of the things that we said in our Airport policy was that the Commission must do everything that it could do to get the third nonstop carrier into San Francisco.

Now, this was a matter of continual concern to us, although we discussed it with Mr. Holm and Mr. Needles, and nobody knew quite how to proceed to get this matter heard so soon after the Denver Service Case.

[7379]
[Tr. 1836]

Q. Did they -- did those discussions also take place in the summer of 1956, the discussions with Holm and Needles? A. I would say that all during the year of 1956. I am not suggesting that we were continually discussing it, but I certainly discussed it two or three times with Mr. Holm and Mr. Needles in the year of 1956.

I discussed it with the Mayor toward the end of 1956.

Don Fazackerly was appointed to the Commission, and I know we had serious discussions about what we were going to do and how we were going to get service, a service pattern comparable to our competitors, and how we were going to manage to keep up with our competitors if we didn't get this third nonstop service.

Now, early in 1957, and I can't tell you the date, I think I was contacted by American again. I can't tell you who made the contact. It may have been Tom Barbour. I may have talked to Morris Shipley, but I just don't remember who it was. American said that, in their opinion, the time had come to move on the matter. I said that we were always ready to move, and all we wanted to do was to be sure that we had some chance of success, whereas, as I remember, Shipley asked me, and I am almost certain this was Shipley, he asked me whether the City would file a petition to get this matter heard.

I discussed it, I am certain, with airport management and with Mr. Holm or Mr. Needles and with Commissioner Fazackerly. We decided it was not in the interest of San Francisco to file that petition.

If American would take one of its older dockets and move to sever the nonstop segment and expedite it, we would intervene and get the City into the case that way. As I recall, American then did do this and after consideration by the Commission and the Commission was thoroughly familiarized with this matter, I think that even though we were, we still had oral argument. I am certain that United and TWA came out and opposed the adoption of this resolution.

The Commission adopted this resolution and this is the first formal act of the City in relation to the proceeding that is now before us.

Q. Mr. Martin, you stated that you told Mr. Shipley that if American would file the motion to sever and expedite, the City of San Francisco would intervene in support of that motion, is that correct? A. Well, I assume so. I don't know that I could give him any definite commitment. There are five commissioners, but I am certain that there was no mystery that the City of San Francisco was very interested in getting this service.

We felt that it was not in our interest to file the matter ourselves, but if they were going to file it and take

[7381]
[Tr. 1838]

the laboring oar, then, I am certain that he knew that we would intervene or I would recommend intervention on their behalf. Well, not their behalf, that is wrong.

I would recommend intervention so we could get a third nonstop carrier. I always made it clear to Mr. Shipley and everybody else that we didn't care which airline got the third nonstop route as long as we got adequate service.

Q. Did this discussion with Mr. Shipley take place prior to April of 1957 or can you place the month? A. I can't tell you, but it certainly took place prior to May of 1957. I am judging from the date on this resolution.

Q. If I could refresh your recollection, I believe on May 3, 1957, American Airlines filed a motion to sever and expedite. A. Well, it took place before they filed that motion.

Q. How long before that to the best of your recollection? A. Well, I would say within a month or six weeks before. I can't be certain, but I am certain that once it was decided to go ahead that this was all part of the same package.

Q. You stated that there were five members of the Public Utilities Commission, and you and Mr. Fazackerly by this time agreed that a third carrier was necessary, is that correct? A. Well, no. I said there were five members of the Commission and I said that I discussed the matter with Mr. Fazackerly more than with the others. He is the fellow who

[7382]
[Tr. 1839]

succeeded me as president the next year, and I am probably closer to him, but all five members had discussed this thing.

This is particularly true with Commissioner Del Carlo who was the labor member, and there was just no question in our minds that we had to have this complete unity.

Q. Did you have any other -- strike that.

These discussions or presentations which you have stated were made by persons from American Airlines after this luncheon at Jack's Restaurant -- A. Yes.

Q. What date would that be to the best of your recollection? A. That would be -- I certainly wasn't on the Commission more than two months. It would be in March or April of 1956. It might have been anytime earlier in '56.

Q. And the presentation to the Commission at a formal meeting was when? A. One week later, and it was actually the same presentation. This consisted of all the memorandum -- there was only one that had been shown us at Jack's to be presented to the press and the public at the meeting the next week.

Q. Was the next time you discussed this matter with anyone from American Airlines your meeting in the spring of 1957 with Mr. Shipley? A. I doubt it. After all, when you are on the Public

[7383]
[Tr. 1840]

Utilities Commission in San Francisco, you are seeing these air line representatives all the time. All the air lines, all the time, and I wouldn't want to make that statement.

Informally, this matter was probably mentioned a number of times. This was of major concern to us and it was a matter I determined to do something about.

Q. You discussed it a number of times with American Airlines? A. Well, I certainly talked to any number of people about it. There were no formal discussions about taking action or something like that, as I recall, until Mr. Shipley asked us to file the motion.

When you say "discussions" I want you to understand that we met every week and this is a matter that was continually before us and that we were continually looking for a way to do something about it.

Q. Mr. Martin, I will give you a copy of BOE-43.

I believe this is the form resolution and the way it appeared, is that correct? A. I assume so; it looks like the form our resolutions usually take.

Q. Can you tell us who drafted this resolution? A. No, I cannot. The resolutions are given to us. As a matter of fact, we passed them from a calendar and we never see the resolution until we see the minutes. Our secretary,

Bob McDonald, who is no longer the secretary, drafted a lot of them, but it would be my guess that the City Attorney would have drafted this one being as important as it is.

Q. And which City Attorney would draft these? A. That I couldn't tell you. It might have been Frank Needles or Tom O'Connor who is our Public Utilities Commission counsel.

Q. Did the Commission request somebody to draft these for them or what is the procedure? A. As I say, you get a calendar of a statement of things you are going to do, and the first time you see most resolutions -- some resolutions are spelled out in the calendar and some resolutions are presented, that is, some resolutions that are being presented on major problems are actually presented to the Commission.

The procedure is not too regular or formal. This may have been presented to the Commission, and we may have actually read it before we passed it or we may have said we wanted to intervene and told them what we wanted to do and let them draw the formal language.

I can't tell you which way it was.

Q. Did you receive a draft of the resolution before the Public Utilities Commission acted upon it? A. I can't tell you that.

Q. Did you discuss the contents of this resolution with

[7385]
[Tr. 1842]

anyone from American Airlines? A. I am certain we did not at the time; at least, I didn't.

Q. I refer you to the very last paragraph of the resolution which sets forth the manner in which this resolution will be distributed. A. Yes.

Q. Could you tell us who decided upon the method of distribution or the persons to whom this resolution would be distributed? A. I can't because I don't know exactly how the resolution was drafted.

It is entirely possible, and if you had the press reports of the meeting, you would be able to see that it is entirely possible that I may have said that if we are going to get this, this was going to have to have a lot of work done on it because it was going to be difficult. We were going to be opposing one of the most powerful forces in this community, United, and that we would have to get the support of all of Northern California to make the Board realize how important this was to us.

The reason for that was that the Board would have to have that kind of evidence in order to go completely outside of their normal procedure to sever and expedite this.

I may have said that and the resolution may have been

[7386]
[Tr. 1843]

incorporated my statement.

This may be a regular form although I am inclined to doubt it. I don't think San Francisco had ever before gone out as actively to get a thing, and I like to think that I am responsible for that.

Q. And you feel that as a result of getting this support of all the Northern California counties you were successful in achieving your goal? A. I believe that we convinced the Board that this matter was not merely a matter, was not merely a matter of competitive advantage from one air line to another, but the commercial future of the entire Northern California area was at stake and our competitors were giving better service, getting better traffic patterns and that this was a matter of vital and immediate concern.

It was made more so by the development of the jet. I think that is the only reason the Board ever went outside, completely outside its normal procedure. It wouldn't have come up for five years and we couldn't wait five years.

The people of San Francisco had a financial interest in the airport, and the Board might have felt that it wasn't really important, but when all of the people of Northern California got as excited as they did about a matter like this, I think it made an impression or at least it should have.

Q. And you felt, as part of this, it was necessary to

stimulate the interest of Senators and Congressmen, is that correct? A. That is the only representatives we had in Washington. Shortly after we passed this resolution, I appointed a committee to carry out the terms of this resolution and on that committee were Mr. Needles, its chairman was Virgil Elliott, Mr. Messerschmidt from the airport, William Lauche who is San Francisco's representatives in the counties in the Bay Area and there may have been some others.

I think Don Cleary was also on this and we made it a point to educate everybody we could. I am certain that Mr. Messerschmidt went around and made a lot of speeches and we decided we would use the same tactics our competitors were using and we would really go out and fight for something for a change.

Q. Mr. Martin, how did you wish the support of your Senators and Representatives to be demonstrated? A. I don't know. I had no particular clear idea of that. That was their job, and I know that they wrote letters, sent telegrams to the Board and that they evidenced a sincere interest.

After all, we are only asking for a hearing and we weren't asking for a decision on the merits. We were so certain of our case that we knew that if we could ever get a hearing -- well, we were willing to take that chance, and I

[7388]
[Tr. 1845]

don't think I ever gave any particular clear thought to it. I thought at certain times they could appear before the Board.

Q. Did you discuss this help of your Congressmen with anyone from American Airlines? A. Oh, sure. I am sure that Mr. Strickler and I discussed it. He took over for American Airlines after we got into this thing or maybe when we were getting into it, but I don't remember.

He was actually useful to us as far as I was concerned. We have got a terribly small staff and we are trying to run and build an airport. We haven't got many leg men and we made it a practice to accept the help of all the air lines whenever we were walking down the same side of the street.

They could do the leg work because we have no staff to even get the information.

Q. Limiting my question now to specifically the Congressional support, how did Mr. Strickler help you, if in any way? A. I don't think that Mr. Strickler helped us in the Congressional support. I think that the City's interest in the thing is what got the Congressional support, I am certain that I told him who we were going to contact.

Q. You told Mr. Strickler who you were going to contact? A. We discussed this with the Mayor. I think all the -- well, I think that practically all, if not all of the contacts with Congressmen and Senators, were made by City officials.

[7389]
[Tr. 1846]

Now, American undoubtedly was making their own but we weren't relying on American. We didn't know what they were going to say and we had our own story to tell and we wanted to tell it.

Q. Did Mr. Strickler or anyone else from American Airlines suggest anything you might tell these Congressmen which would convince them to be on your side? A. Well, American furnished us with a lot of data that we used. There is no question about that. I am certain that we never could have developed the information necessary, statistics, that have to go into a CAB presentation.

Q. Who -- A. We did discuss this and back and forth we had a mutual problem up and we had a common solution up to the point of which air line was accepted and this is why we always wanted to tell our own story because we wanted to make it perfectly clear that we weren't backing American.

We wanted the service and so we never let American make our contacts for us, but I am sure they made their own.

Q. You state they furnished you with data. Did you use any of this data in correspondening with Congressmen? A. Well, I am certain we did. Just what we did, you'd have to ask Mr. Needles. He is the fellow that wrote the brief and he knows just where he got the data, but one thing that impresses me and convinces me was right from the

[7390]
[Tr. 1847]

memorandum there was a list of services that San Francisco was getting at least six months and in many cases 18 months later than Los Angeles which is our big competitor and I am certain that this list carried right through and unfortunately, was expanded as time went on as Los Angeles got the jets before we did and everything else.

Now, that is the only thing I remember.

MR. WESTWOOD: Pardon me, Mr. Examiner. I am not sure what the record shows that the question was to which response has just been given.

I think the record -- the question was added to as the witness began to talk.

MR. HUISENTRUIT: Have the reporter read it.

(Record read).

THE WITNESS: Well, in corresponding with Congressmen, I know that we used this series of things to show that Northern California was being discriminated against by the decision of the Board in the Denver Service Case.

[BY MR. HUISENTRUIT:]

Q. And did you get this data showing discrimination between Northern and Southern California from anyone in American Airlines? A. This was in the original memorandum which was presented to the Commission by Mr. Barbour in '56 and as I say unfortunately the list got longer as time went on.

That is the only thing that sticks out in my mind.

[7391]
[Tr. 1848]

This is the thing that convinced me more than anything else that we were in trouble.

Q. Mr. Martin, who added to the list? Who kept informing changes on the list? A. Well, one thing added to the list, they did get the jets a year ahead of us or eight months ahead of us; so what we had to do was add the services that Los Angeles was getting that we weren't getting.

I am certain that this list was not new to Mr. Holm or Mr. Needles; they could have written the same list but it was new to me, being new on the Commission, and that is what impressed me.

Q. Did you inform anyone from American Airlines that you were using their information in presenting your case to Congressmen?

MR. HOLM: What was the question there, please?

EXAMINER STODOLA: Read the pending question, please.

MR. HOLM: Just a moment.

(Question read).

[THE WITNESS:] Well, I don't know. I didn't particular consider it American's information. They brought it out the first time but these were facts that everybody knew.

I am certain that American was informed as to what we were doing.

BY MR. HUISENTRUIT:

Q. Do you know that for a fact? A. Well, certainly. I informed Mr. Strickler of many of the actions that we were taking. I discussed what actions he was taking. As I say, we considered up to a point that we could use American Airlines here, use their help, their staff.

Q. Did you show Mr. Strickler or anyone else from American any draft letters which you proposed to send to Congressmen? A. I am certain, and I can't remember any specific instances, but this was going on for a long time. It wasn't in several stages. We lost the case first and it just sort of got in by the back door and this started it all up again.

I am certain that we may have drafted the letters together.

Mr. Strickler was in San Francisco. We discussed this thing; it wasn't anything particularly formal.

Q. And did you furnish Mr. Strickler or anyone in American with courtesy carbon copies of letters that you sent to Congressmen? A. I am sure that we did. Which ones, I don't know but I am certain that we did, if we thought it would be to our advantage to have American see them, why we sent them copies.

Q. And who on your staff, Mr. Martin, would do the actual preparation of the letters? A. I can't answer that. I never really did find out.

[7393]
[Tr. 1850]

We didn't have very much of a staff at the Public Utilities Commission.

You really ought to go out there and take a look. For running a billion dollar business, there was a man secretary and there was a lady secretary.

Mr. Elliott, our public relations man had a secretary and I used to have a lot of letters occasionally typed in my office and drafted.

Q. Excuse me, my question might not have been entirely clear.

I didn't mean the physical typing of the letter. I was referring to the composing of the letter in its initial stages. A. Well, many of them I composed myself, usually in consultation with manager of the airport. Virgil Elliott, he was our public relations man and whom I had a great deal of confidence in usually looked them over and gave me advice.

I couldn't say who wrote them all.

Q. Did the City Attorney's Office assist you? A. Undoubtedly.

Q. In the drafting? A. Undoubtedly I showed everything to the City Attorney's office before it went out.

Q. Mr. Martin, I again refer you to this resolution which appears on page 398 and also BOE-43.

[7394]
[Tr. 1851]

Will you tell us to whom this resolution was distributed in addition to the persons named in that last paragraph? A. I can't tell you that. I wouldn't remember but I know that we sent it all over Northern California.

Now, just who got it and at what times, I wouldn't know, but it received very wide distribution. I am sure that newspapers all got it. This was our campaign document. This was our policy.

Q. I refer you to page 459 of the volume you have before you, Volume I of the Joint Appendix, bracket No. 469. A. Yes.

Q. First of all, I would like you to read 470, I am sorry, 470.

A. All right.

Q. Now, apparently you sent a copy of this resolution to Mr. George -- how do you pronounce the name? A. Milias.

Q. Milias who is president of the California Republic Assembly, is that correct? A. I don't know if we sent him a copy of the resolution. I certainly wrote him a letter which probably, a little more affectively to a layman, put out the case to him.

I certainly informed him of what we did and what we wanted.

Q. What was your purpose in writing to Mr. Milias, what

[7395]
[Tr. 1852]

did you hope he would take or expect? A. I hoped he would take exactly what he did to write the Congress or the Senators and the Northern California Congressmen in another effort to convince them of the importance of this thing to their constituents so that they could do whatever they ought to do to impress the Board to their constituents.

Q. Then, I refer you to a letter on page 471. A. All right.

Q. And to an attachment which appears on page 472. A. I fortunately or unfortunately am somewhat engaged in Republican politics and I knew all these people and I took it upon myself to write them.

Certainly, I went to some of my Democratic friends, Roger Kent or someone, and had them write their Congressman.

This was completely nonpartisan but we opened the door that I thought would be more effective to those people.

Q. In writing to Mrs. Benedict, what was the purpose, the same as in writing to Mr. Milias? A. I am certain that the same letter was sent to Mrs. Benedict and Mr. Milias, but I am not absolutely positive.

Q. Did you expect them, or rather the Congressmen and Senators they might write to, did you expect those Congressmen and Senators to write to the Board? A. I hoped that they would.

[7396]
[Tr. 1853]

Q. I refer you to page 458 of Volume I of the Joint Appendix. A. Yes.

Q. Did Mr. Milias inform you that he had written to H. Allen Smith on behalf of a third carrier or an expedited hearing? A. I am not certain how this worked, but I wrote Mr. Milias, and I think that he sent me copies of the letters that he wrote and said, "I agree with you, and this is what I am doing."

I don't recall the exact steps, or how it happened.

Q. Do you recall whether H. Allen Smith was one of the Congressmen whose letters Mr. Milias sent to you? A. I don't recall.

Q. Then I refer you to page 516 of the Joint Appendix.

MR. NEEDLES: What was the page, please?

MR. HUISENTRUIT: 516.

MR. NEEDLES: Thank you.

THE WITNESS: Yes.

BY MR. HUISENTRUIT:

Q. Excuse me, 517. A. Yes.

Q. Did Mr. Milias inform you that he had passed on information to Congressman Hillings concerning the expedited hearing?

[7397]
[Tr. 1854]

A. I don't recall. It is my impression that -- I mean, you picked H. Allen Smith and Pat Hillings, both of whom were Southern California Congressmen.

Getting their support is a little more than I would have expected. I don't recall which, I don't recall that I ever knew exactly to whom Mr. Milias wrote. I certainly received copies of letters.

Q. These were letters from Senators and Congressmen, were they? A. Letters to Senators and Congressmen.

Q. All right. A. From Mr. Milias, stating that he knew the situation, and he hoped that they would look into it.

Q. Did you show these letters to anyone, or discuss -- A. Well, as I recall, I took them all out to the Public Utilities Commission and left them there.

Q. Did you discuss them with anyone from American Airlines? A. I may have. I don't recall, but it is perfectly possible.

Q. Now, Mr. Martin, I would like to refer you to an exhibit which is in evidence marked as BOE-7, and ask you to read that to yourself. A. All right.

Q. Referring to that first sentence in the first

paragraph -- excuse me.

First of all, do you recall receiving this letter, Mr. Martin? A. Well, I don't recall receiving it, but I know very well that I undoubtedly did receive it.

Q. Now, referring to that first sentence, first paragraph, "The attached list includes the people to whom you wrote in connection with the San Francisco-New York Nonstop issue."

Well, what letter is being referred to here? A. Well, I --

Q. Any particular letter? A. I can't be certain of this, but I would assume that it was probably the first letter that we got out to these people. I certainly, I know that I wrote directly to Senator Kuchel myself. I know that I wrote to Senator Knowland myself, then Senator Knowland.

I know that I wrote to both Congressmen Shelley and Mailliard. I wrote to the other congressmen who I personally knew; Milias and Benedict were included in this first letter, if this is the first letter, and I assume it is just from the date, but I can't tell.

Q. Mr. Strickler attached a list of people to this letter, apparently. Did you give him a list of the people to write to or send letters out under your name?

[7399]
[Tr. 1856]

A. No, I wrote all my own letters and sent them out, but I undoubtedly told them who I had written to.

As I said, we kept each other informed as to what we were doing.

Q. Well, in this case Mr. Strickler is informing you to whom you wrote; is that correct? A. Well, if I recall this right, Mr. Strickler came to my office and we developed this list together, and he wrote it down while I was thinking them up, and then he took it and had it typed.

Q. This was prior to sending the letters, is that correct? A. This was prior to sending the letters.

Q. And then referring to the second paragraph it states that he is also enclosing a list of people to whom Mayor Christopher wrote? A. Yes.

Q. And he is referring to the letter of July 31, '57, which appears at page 537 of the Joint Appendix. I refer you to that. A. Well, all right. Let me correct my testimony.

This letter went out after the Board had denied our application, or American's application, for severing and expediting, and this really was upsetting, and this is, these letters are the result of the Board's action. This was action

[7400]
[Tr. 1857]

taken of the Board in the first docket.

Q. This is after the July 3rd letter? A. Yes. You can tell from the first paragraph, June 26th, apparently the Board denied --

Q. Now, did you help compose the letter which Mayor Christopher wrote? A. I don't recall whether I helped compose it or whether somebody else composed it, whether Virgil Elliott, whether Charlie Strickler -- I just wouldn't know. I am sure I read it.

I was undoubtedly the one that took it in to the Mayor to sign. He wouldn't have signed any letter unless I took it in and discussed it with him and told him that I thought it was advisable.

Q. Did you as a general practice take the letters in to the Mayor to sign which related to this problem of third carrier? A. Well, anything that he signed I had to go in and explain to him why he was signing it.

Anything I signed, unless there was some particular reason, I wouldn't clear with him.

Q. Now, you stated that several, the names of several other persons who may have drafted some of Mayor Christopher's letters originally, is that correct, and then give them to you for your approval?

[7401]
[Tr. 1858]

A. This would be the usual procedure. The Mayor wouldn't draft a letter like this involving technical knowledge of a technical subject. He would rely on his departments to furnish him with the letter and explain it to him.

Q. And you mentioned Charlie Strickler. Do you know, remember the occasion or any occasion in which Mr. Strickler helped you in drafting a letter which went out under Mayor Christopher's signature? A. Well, I don't recall any specific occasion. After all, this was three years ago, and it sort of takes all, just a general impression in my mind, but there is no question but that when these things would, or had to do, and when Mr. Strickler was here he worked with Virgil Elliott, together, and with Frank Needles, I assumed.

We were glad to have any help we could get, and we used it.

Q. This was in the drafting stage of the letter, is that correct? A. Yes, and I would undoubtedly approve it in the draft stage after making such changes as I wanted, and then it would go to the Mayor.

Mr. Strickler certainly had no policy prerogatives in this matter.

I decided that, or the Commission decided that, but on things like this I would act for the Commission.

[7402]
[Tr. 1859]

Q. He made suggestions to you, did he not? A. He would undoubtedly suggest language, and suggest facts that might be used. Mr. Needles would do the same thing, and Mr. Elliott would do the same thing.

Q. Then in the second paragraph I note that Mr. Strickler is sending you a list of people to whom Mayor Christopher wrote.

Would Mr. Strickler assist you in mailing the letters? Would he address them for you or have his people address them for you? A. Again I think this is another instance of a list that was developed by Mr. Strickler, maybe Mr. Elliott and myself sitting down saying who can most effectively help us in this matter, and Mr. Strickler acting as secretary, doing the hard work.

He wrote it out, and then he would get it typed, and then would send us the list. I don't recall the exact list. I don't know whose names were on it, but undoubtedly there was.

Q. In drawing up such a list I assume that you would suggest names that should be added, right? A. Well, I was the one that was most cognizant with people in California. I suppose I was one to determine, and I am certain that nobody ever got a letter that I didn't think they should, and there were some people that I didn't think should get letters, and I approved everybody that got one.

[7403]
[Tr. 1860]

Q. And Mr. Elliott and Mr. Strickler would make suggestions of the names of people who should be on your list? A. Occasionally.

Q. I refer you again to the letter that appears on page 537, and going on over to page 538, I would like you to read to yourself very carefully the last full paragraph of that letter.

(Short pause).

A. All right.

Q. You will note in that paragraph that you or the Mayor requests a date in which we can sit down with the Board and staff to discuss the problem, namely, additional nonstop service.

Do you know, or could you tell us who suggested that this request be incorporated in the letter? A. No, I can't. The Board's order, as I remember, said there would be a staff study, and I can't remember whether on inquiry we found out that the Board intended to send the letter out, and whether this was something that Mr. Needles and I felt was important.

I don't recall, but it would be a natural request on our part, because we felt the Board's action came from really a lack of understanding of the situation on the West Coast. None of the members were from the West Coast at this time. We didn't feel that we could get the picture to them unless they

came out here and we could let them see for themselves the feeling and the situation, so I don't know who suggested it, but it would be a logical thing for the City to have suggested at that time.

Q. Did you discuss this sitting down with the Board with Mr. Elliott, Mr. Needles and Mr. Strickler? A. We discussed this all the time. I mean, this was my major project, and I never let them forget it.

Q. What was Mr. Strickler's views on such a conference? A. I have no idea. I wouldn't recall, and it wouldn't have made any difference to me what his views were.

Q. How about Mr. Needles in the City Attorney's Office? A. Mr. Needles must have approved it or I wouldn't have sent the letter.

Q. I refer you then to the following on page 539. Apparently after you wrote your letter, or after the letter of July 3 was written, the Board requested that the letter be resent to all parties.

Now, do you recall that? A. I don't, no.

Q. Was there any discussion concerning the resending of this letter, to your recollection? A. I do not recall any. Undoubtedly the Mayor sent me a copy of this letter. I probably phoned Frank Needles and said, what about it, and called a meeting, but I don't just

recall at this point.

Q. Now, Mr. Martin, I think we are all aware that in December, December 2, as a matter of fact, 1957, the Civil Aeronautics Board invited -- strike that.

On December 2, 1957, you and Mr. Schlesinger appeared in conference before the Civil Aeronautics Board, setting forth the air needs of the City of San Francisco, is that correct? A. Yes, sir.

Q. Do you recall that conference? A. I certainly do.

Q. Will you tell us the steps which led up to that conference, as far as the getting of the invitation is concerned? A. I don't recall exactly, but I have a feeling, and this may be wrong, that Senator Kuchel arranged this for me, or it may have been Knowland. We had been very disturbed at this situation.

We knew this was out last chance, and we wanted to know what we could do.

Q. By this situation, what are you referring to? A. Well, the action of the Board, first, in denying us and giving us this little hope that they would further investigate. We just felt that we couldn't leave any stone unturned to get an expedited hearing.

EXAMINER STODOLA: We will take a short recess.

(Short recess).

EXAMINER STODOLA: Let us be resumed, please.

Mr. Reporter, will you please read the last question and answer?

(Record read).

THE WITNESS: This is all that we were after at this time. We were not making any effort to convince the Board on the merits. All we wanted was a chance to give our case and present our facts, and we were sure that we would win.

BY MR. HUISENTRUIT:

Q. Mr. Martin --

MR. HUISENTRUIT: Mr. Examiner, at the recess I passed out two exhibits for the parties to look at. I would like to have them marked for identification.

One is an article appearing in the San Francisco Chronicle of November 21, 1957, and I would like to have that marked as BOE-86.

EXAMINER STODOLA: It will be so marked.

MR. HUISENTRUIT: The second is a newspaper article appearing in the San Francisco Chronicle of November 26, 1957, and I would like to have that marked for identification as BOE-87.

EXAMINER STODOLA: It will be marked as BOE-87 .

(The documents referred to were marked Exhibits Nos. BOE-86 and BOE-87 for identification).

[7407]
[Tr. 1864]

MR. HOLM: Do you have a copy of this, Mr. Martin?

THE WITNESS: No, I haven't.

MR. HUISENTRUIT: I thought you were familiar with these.

MR. WESTWOOD: I am confused. You say these are two newspaper articles?

EXAMINER STODOLA: Mr. Huisentruit, does the Joint Appendix contain these documents?

MR. HUISENTRUIT: To my knowledge, no; I do not believe so.

BY MR. HUISENTRUIT:

Q. Mr. Martin, will you familiarize yourself with BOE-86? A. Yes, sir.

Q. Referring you to the article which is entitled, "Lobbyist on the Brink," the second paragraph -- excuse me. I will ask you this preliminary question.

Having read these two articles appearing on BOE-86, are they correct to the best of your recollection? A. Well, they certainly report that I appeared before the financial committee of the Board of Supervisors, and I would assume that some of the quotations are accurate. It is a little hard to tell who is saying some of the things here.

Q. Let me ask you specifically, then. A. The whole article is written with a slant for a problem which has nothing to do with this, a local problem in

[7408]
[Tr. 1865]

the City, as to whether or not we should have a Washington lobbyist.

It is hard to say whether they are completely accurate.

Q. I would like to ask you specifically; "Lobbyist on the Brink" states, "The San Francisco Aviation future depends on getting a lobbyist by the name of Cleary to Washington on Tuesday."

Looking at the date of the newspaper article, I take it that would be Tuesday, November 26, 1957. Why was it so important to get Cleary to Washington by Tuesday? A. Well, Mr. Schlesinger and I were going back to Washington. I don't know whether it was Saturday or Sunday, but it was sometime later. We had to get there for the hearing on December 2, and we wanted Mr. Cleary back there to check with all of the Northern California Congressmen.

Again, to point out the purpose, Mr. Cleary was to go back there to see them and tell them how terribly important this was to us, and to check with our Senators.

I think we also wanted him to check with the New York people to find out what they were doing. After all, we felt New York was just as interested in this as we were.

Q. By "New York people," are you referring to New York

Congressmen and Senators? A. New York Congressmen and Senators. Mr. Cleary was

[7409]
[Tr. 1866]

selected because, in the first place, he was on this committee that we set up, the one I referred to, I am pretty sure; and in the second place he seemed like the logical person to go.

As you can see, there were other purely local elements mixed in with Mr. Cleary's selection for this job.

Q. Now, had you discussed sending Mr. Cleary to Washington with either Mr. Elliott, or Mr. Needles, or Mr. Strickler? A. Well, before this could even happen the Public Utilities Commission had to adopt a resolution. I assume the finance committee -- well, the finance committee always meets on Wednesday, and that would be the 20th that I appeared.

The previous Tuesday we must have adopted a resolution.

The whole Commission appeared and decided to appropriate this money. I undoubtedly discussed it, not only with Mr. Elliott and Mr. Needles, but with everybody.

Q. Did you discuss with Mr. Strickler? A. I am sure we told them what we were going to do. I don't remember the discussion.

Q. Do you know whether Mr. Strickler gave you any suggestions that might facilitate either sending Mr. Cleary to Washington or facilitate his contacts when he got there? A. I don't. Mr. Strickler undoubtedly was trying to be as helpful as he could be to us, but what he specifically

[7410]
[Tr. 1867]

suggested I don't recall. I didn't consider myself a stooge for him. I thought he was working for me, and anything he could do to be helpful within the direction of -- the direction that San Francisco wanted to go, I undoubtedly would have taken him up on it, but what he suggested I don't know.

Q. Did you yourself originate the idea of sending Mr. Cleary to Washington, or did someone else? A. I am not at all so sure that Mr. Cleary didn't originate this idea himself. I think you might get that feeling from the article. Anyway, I am a good friend of Mr. Cleary's, and we discussed this thing many times, and somehow or other it came up and we thought it would be a good idea for Mr. Cleary to go back to Washington.

I am certain Mr. Strickler had nothing to do with that decision.

Q. Did you tell Mr. Cleary what he should tell these congressional contacts which he might make in Washington? A. You don't tell Mr. Cleary very much, but he informed me what he was going to say.

Q. What did he tell you? A. That he was going to see them and impress upon them the importance of the situation and what they could do to help us.

Q. When you say "of it," what are you referring to? A. The importance of --

[7411]
[Tr. 1868]

Q. Of a conference with the Board? A. No, of San Francisco giving the service. The conference was already set.

[7412]
[Tr. 1869]

Q. The conference was already set? A. It was set, not the hour, the details but the day was set. Mr. Cleary was going to check with Senator Kuchel's office and make certain when we had to be there and what the story was and he was going to work this thing around Washington and do anything that he could that would help San Francisco.

That was his job and he is pretty resortful. We didn't give him any orders.

Q. I didn't mean to cut you off when I asked you what Mr. ~~Strickler~~ Cleary told you. Did you complete your answer? A. He told me he would contact the Congressmen from Northern California, he would contact key Congressmen from New York and find out what they were going to do and he would impress upon the California Congressmen the importance of this and they should do anything that was within their power to impress upon the Board the importance of it.

He was to set up the details of the meet.

Q. Mr. Martin, do you know whether Mr. Strickler suggested any contacts with Mr. Cleary? A. He may have; I don't know but it is quite possible.

Q. I am referring now to the second article entitled, "Two Supervisors back capitol trip" in the third column, first full paragraph, it states that Mr. Martin told the Commission, and they are referring here to the Public Utilities Commission -- A. That is right.

[Tr. 1870]

Q. That you wanted Cleary, the city lobbyist in San Francisco, to let a third air line fly nonstop between San Francisco and New York.

Is that an accurate statement? A. Those are Mr. Burby's words. I had good reason to remember this very clearly and I said, "legitimate pressure." These are the words that I used and you will find my quote further down in the article.

Q. I would like you to read the passage which is quoted in the article which begins about the middle of the fourth column.

Again, this reporter is purportedly quoting you, stating: "If you don't get the third carrier and don't get it quick, this will be a blow to San Francisco."

You refer to the fact that Cleary's role will be as a quarterback and then you say that the administration must put pressure on the Civil Aeronautics Board in this matter.

Is that an accurate statement? A. Well, I wouldn't know. It may well have been. I certainly said the substance of that.

Q. Now, Mr. Martin, I ask you to read the article appearing on BOE-87, taken from the San Francisco Chronicle, November 26, 1957.

(Short pause).

A. All right, sir.

[7414]
[Tr. 1871]

Q. This article is entitled "City Sends Lobbyist to Washington." Is this report accurate in so far as report of the facts as they happened? A. I certainly appeared before the Board of Supervisors on the next Monday and before the full Board and told them that I thought it was very important for Mr. Cleary to get to Washington and the Board approved the period. Again, these articles are full of tones about whether the City needs a fulltime lobbyist in Washington which was a burning question at that time.

I wouldn't like to state that the reporting was completely accurate as far as the adjectives used, but I did appear before the Board and I probably made the statement attributed to me.

Q. Unless you got favorable action now, it would be six years before you would get another chance; did you say that? A. I undoubtedly said that to hammer my point home. It is not easy to get $2,500 out of the Board of Supervisors.

Q. Mr. Martin, as you stated, previously, I believe, Mr. Cleary preceded you to Washington? A. That is correct.

Q. Then when did you leave for Washington; do you recall? A. Well, Mr. Schlesinger and I left together and as I recall we left on a Sunday. You would have to check the dates. We were only in Washington two nights.

[7415]
[Tr. 1872]

Q. Was your meeting with the Board the following Monday or was there a delay over in Washington before you met with the Board? A. It is my recollection that our meeting with the Board was the day after we got to Washington. We then spent two nights in Washington and left for home the next day.

Q. Now, prior to leaving for Washington, Mr. Martin, did you discuss with anyone the remarks which you were going to make in your presentation before the Board? By "Board" I am referring to the Civil Aeronautics Board. A. Well, I certainly must have. I don't recall that part of it now but I certainly must have. I know I was briefed.

Q. Who briefed you, sir? A. Mr. Needles and Mr. Messerschmidt, I know that they gave me material to take on the plane and read. I don't now recall exactly what that material was.

Q. Will you please identify Mr. Messerschmidt? A. Mr. Messerschmidt is, I think his title is director of airport operations. He is the No. 2 man at the airport and he is the technical man, the one who --

Q. He is a city employee, is he? A. That is correct, yes.

Q. Now, these materials that Mr. Needles gave you, did they include any material which had been prepared by American Airlines?

A. Well, I'd have no way of knowing that. I don't recall exactly what the material was at this time. I just remember that I was given a folder to read on the plane so that I could sound intelligent when I appeared before the Board. That is . . .

Q. Did you discuss this trip to Washington to meet with the Civil Aeronautics Board with anyone from American Airlines prior to the time that you left the City of San Francisco? A. Undoubtedly. I don't recall the specific instructions but American was kept fully informed as to everything that the City was doing in this matter, and I undoubtedly discussed it with Mr. Strickler and with Mr. Shipley.

I don't recall the specific conversation.

Q. Will you tell us, Mr. Martin, during your conversations with either Mr. Strickler or Mr. Shirpley, did they give you any suggestions as to what might be an effective presentation? A. Well, I am sure that they must have. I don't recall specifically; after all these were discussions back and forth and they undoubtedly expressed their ideas as to what we ought to do and I am certain that we listened to them and gave them consideration and may even have adopted some of them.

Q. Now, you state you left San Francisco on Sunday night? A. Sunday morning.

Q. Sunday morning, I am sorry.

And you were in Washington all day Monday, is that

[7417]
[Tr. 1874]

correct? A. That is correct.

Q. Now, during either Sunday or Monday after you arrived in Washington, did you meet -- A. We didn't get --

Q. -- with anyone from American Airlines? A. We didn't get to Washington until late. Mr. Cleary met Mr. Schlesinger and me at the airport. We went to our hotel. We went out to dinner. We went back to our hotel and that was that.

That is all we saw on Sunday.

The next day -- I forget the time that this had been set by the Board -- I think it was probably 11:00 o'clock; maybe it was 10:30; I didn't see anybody from American Airlines before the hearing but I was informed either by Mr. Shipley or by somebody from Mr. Shipley that United had managed to get the quotes from the San Francisco newspapers in the little trade journal that circulates around Washington, and they had managed to get it in just the day before I would appear before the Board and that the Board had seen those quotes and also that Mr. Moulders' committee was just at the coming into start their investigation so that it might be very interesting for me when I got before the Board.

This was the information and nobody could give me any advice as to how to handle this.

[7418]
[Tr. 1875]

Q. Did you state that you didn't know whether it was Shipley or Strickler who told you this? A. I couldn't tell you.

Q. And did they -- you state they didn't give you any advice. Did they made any suggestions at all? A. Not a one.

Q. Of what you could do? A. No, I was on my own. I had never been so much alone.

I went out to Washington's Tomb and walked around trying to figure out what I was going to do. I recall this very well.

Q. Now, prior to making your presentation to the Board, that is after you arrived in Washington, did you either by meeting or over the telephone or in any other manner communicate with anyone from American concerning what your presentation would be, the substance of the presentation? A. No, the planned substance of my presentation had obviously been set before I left San Francisco.

Q. All right. A. The added developments, as I say, I was left on my own as far as those were concerned.

Q. Did you have any meetings with anyone from American Airlines after the completion of your Board conference in Washington?

[7419]
[Tr. 1876]

A. As I recall, after the conference we were quite upset and I don't recall the exact sequence of events but I know that there was a problem of getting out a statement for the press for the home newspapers and I went over to Senator Kuchel's office and he and I sat down and held each other's hand and developed the best statement that I could give, and this took a great part of the time.

We also, as I recall, got a call from Senator Knowland asking what we had done to throw the ball in the grandstand and raise so much furor; so, the afternoon I was pretty busy.

That night, as I recall it, we had Mr. Cleary and Mr. Schlesinger and I had drinks and dinner and then a few more drinks with Mr. Strickler and Mr. Shipley.

Q. Were both Mr. Strickler and Mr. Shipley present at the dinner also? A. Yes, sir, as I recall. Now, I am pretty sure of this.

Q. Did you report to them the happenings of the conference? A. I told them as well as I could remember word for word what had gone on.

I think they had already found out from their own sources what the story was.

MR. HUISENTRUIT: Mr. Examiner, I would like to have marked for identification as BOE-87 -- excuse me, correction, BOE-88, a one-page letter dated December 5, 1957, to Mr. Joseph Martin and apparently sent by Mr. C. W. Jacob.

[7420]
[Tr. 1877]

I will ask you to look at that document and familiarize yourself with it, sir.

THE WITNESS: I am familiar with it.

EXAMINER STODOLA: Mr. Reporter, that letter of December 5, '57, from Mr. Jacob to Mr. Martin will be marked as Exhibit BOE-88.

(The document referred to was marked Exhibit No. BOE-88 for identification).

BY MR. HUISENTRUIT:

Q. Are you familiar with this? A. I am familiar with this letter. I remember receiving it.

Q. And this refers to the conference with the Board which you have just testified about, is that correct? A. Yes, sir.

Q. Now, did you make a -- did you know Mr. Jacob at this time? A. I did. I had known Mr. Jacob for some time.

Q. And did you make a report to him? A. I did not make a report.

Q. Concerning your -- A. To him.

I assumed that his Washington representative sent him the transcript. He was obviously interested.

Q. Did you know what he was referring to when he told you

[7421]
[Tr. 1878]

this kind of presentation with restrictions placed on what you can say is more difficult than a formal one? A. I certainly did. This was a very welcome letter. It was the first kind word I had received since I had thrown the ball in the grandstand but the Board definitely rejected me as you can see from reading the transcript as to what I could say after I had gone there.

BY EXAMINER STODOLA:

Q. Mr. Martin, do you recall Chairman Durfee asking you to make a statement to the press explaining your use of the word "pressure?" A. I do, and as a matter of fact I didn't recall that when I was testifying but that is the statement that Senator Kuchel was helping me draw up so that I didn't make the same mistake that I had already made once by putting my foot in it, but this, he did; this is one of the things the Senator asked me to do.

Q. And you and Senator Kuchel prepared a statement explaining the use of that word, is that correct? A. That is correct.

Q. And this was for the local press? A. It was for the local press, and I assume for the Washington press if there was news back there.

Q. Was this statement published in the local press? A. It was publihsed in the local press. I am certain

[7422]
[Tr. 1879]

it was released and published, yes, because I specifically asked them to publish it.

Q. Do you know in what paper it was published? A. It is my recollection, sir, and I am not absolutely certain but it was only published in one paper of the two. It came out for a morning paper and one paper had the whole statement but the other didn't, and I wouldn't be absolutely certain, but a check of the papers for that day would show that it was published.

Q. Well, when would that story have appeared approximately, after you got back here? A. No, we phoned it from Washington.

Q. I see. A. So it should have appeared on the 3rd.

Q. I see. A. And I think the statement, a copy of it was delivered to Chairman Durfee so that he would see that we had done that.

EXAMINER STODOLA: I see.

MR. HUISENTRUIT: Mr. Examiner, I would like to have marked for identification as Exhibit BOE-89 a newspaper article appearing in the San Francisco Examiner dated Tuesday, January 14, 1958.

EXAMINER STODOLA: It will be so marked.

(The document referred to was marked Exhibit No. BOE-89 for identification).

[7423]
[Tr. 1880]

BY MR. HUISENTRUIT:

Q. Mr. Martin, I ask you to read that and familiarize yourself with it. A. Yes, sir.

Q. Is this article correct in so far as their statement to your knowledge, would you say that the statement in the second paragraph, first column, that "the decision was a clear victory for the San Francisco city officials who had lobbied vigorously for that decision."

Would you say that that was correct? A. Well, I would say that the decision was a clear victory for San Francisco.

The word "lobbied" which is in there is a word with overtones I don't particular happen to agree with.

Q. When in the third paragraph in the bold type is purportedly a quotation of a statement which you made, third column -- pardon me. A. Yes.

Q. Which states that "this action by the CAB shows what can be accomplished when the efforts of Senators Knowland and Kuchel and Representatives Mailliard and Shelley are ~~known~~ joined with those of the Mayor and the Board of Supervisors," et cetera. A. That is right.

Q. Now, did you make that statement, sir? A. I undoubtedly did.

Whether it was a written statement or whether I gave it orally over the telephone, I wouldn't know.

Q. Could you tell us what efforts in your belief when you stated this, what efforts did you believe Senator Knowland exerted to make this expedited hearing possible? A. Well, I don't want to single out Senators Knowland, Kuchel, Shelley or Mailliard at this time. They had all agreed.

They had all written the Board. They had all telegraphed the Board. They had arranged the hearing at which I appeared before the Board and they had done everything that was right and proper for them to do to support our application and I thought they deserved some credit. They are political figures and they liked credit and so did everybody else.

The labor organizations in town were doing the same thing and --

Q. And you at any rate, it was your opinion that the action of the Senators and Congressmen made an expeditious hearing possible, is that correct? A. It was my opinion that their actions helped us get an expeditious hearing.

Q. Now, I would like to go back a little bit to when you arrived in Washington.

Mr. Cleary had been there a couple of days already, had he not?

A. That is right.

Q. Now, did he at any time during your stay there in Washington report to you or inform you of what he had done as far as the Congressional contacts were concerned? A. Well, I don't recall exactly.

Mr. Cleary may even have telephoned me from Washington when I was in San Francisco.

Certainly, when we got back there that night, the main topic of conversation was how we were coming and what we were doing and he undoubtedly told me of the people he had seen, of the people he had been able to present our case to and of the results that he had had.

Q. Did he state that he had received any assistance from anyone in American Airlines in making his contacts? A. Well, he had undoubtedly seen the American Airlines people back there and been in contact with them, but as far as making the contacts, I think that he was operating on my contacts and the Mayor's contacts more than he was on American Airlines'.

I think that we made an effort to introduce him to various people that we thought could help. Now, whether American Airlines also got him to some people, I don't know, but the people I wanted him to see were the people that we told him to go see.

Q. Do you definitely know that he had seen people from

American Airlines while he was there? A. Well, I am certain that he did. This was discussed with American Airlines. There were no mysteries and I am certain that he saw Mr. Strickler and --

Q. Mr. Taylor or would that refresh your recollection. A. Taylor doesn't mean a thing to me at this point.

Q. Yes, sir.

MR. HUISENTRUIT: Mr. Examiner, I would like to have marked for identification as BOE-90 a newspaper article from the San Francisco Chronicle of Tuesday, January 14, 1958, appearing on page 7.

Mr. Examiner, in the process of printing this exhibit, the document -- excuse me.

EXAMINER STODOLA: The document will be so marked.

(The document referred to was marked Exhibit No. BOE-90 for identification).

MR. HUISENTRUIT: In the process of printing this document the photographer inadvertently, I am sure, left out the name of the newspaper and the date which it appeared in the paper and I have here a copy of the article with the heading on it.

I wonder if I could get a stipulation from the parties after looking at the article I have, that this article did appear in the San Francisco Chronicle of January 14, 1958.

MR. HOLM: If you say it has been verified, as far as San Francisco is concerned, we will accept that.

MR. WESTWOOD: We stipulate.

Is it January 14?

MR. HUISENTRUIT: January 14, 1958.

EXAMINER STODOLA: Apparently all parties agree and it is stipulated, Mr. Huisentruit.

BY MR. HUISENTRUIT:

Q. Mr. Martin, I ask you to read that article and familiarize yourself with it. A. Yes, I have.

Q. The third last paragraph from the bottom, in referring to the decision of the Civil Aeronautics Board to order an expedited hearing quotes you as saying "this shows what can be accomplished" then it is of course in quotes "through a conserted local effort."

Did you make a statement to that effect? A. I undoubtedly did because I certainly felt that way.

Q. And then in a bottom last paragraph of BOE-90 you state that -- not the bottom -- the second last paragraph, you state that "the fact the decision was 3 to 2 emphasizes that our fight has only started."

Is that statement correctly attributed to you? A. Undoubtedly. It appears in both the papers.

Q. Apparently you had another program in your mind, did you, when you -- after the expedited hearing came out or did you -- let me put the question this way:

[7428]
[Tr. 1885]

Did you have any intention or notion or idea at this time how you would carry out the rest of your fight? A. Through our attorneys.

Q. I see.

MR. HUISENTRUIT: Mr. Examiner, I would like to have marked for identification as BOE-91, a one-page newspaper article which appeared in the San Francisco Examiner on Wednesday, January 15, 1958.

The column on the left was on the first page and the column on the right was continued to somewhere else in the newspaper and here again the photographer failed to include the caption of the newspaper and the source of the article, and I have here a copy which shows such caption, and I wonder if the parties would stipulate to that fact.

MR. WESTWOOD: Stipulated.

MR. HUISENTRUIT: That ~~is~~ it appeared in the San Francisco Examiner on Wednesday, January 15, 1958.

EXAMINER STODOLA: It will be so stipulated.

By the way, that document will be marked as BOE-91, Mr. Reporter.

(The document referred to was marked Exhibit No. BOE-91 for identification).

BY MR. HUISENTRUIT:

Q. Mr. Martin, I ask you to read -- A. I have read the --

[7429]
[Tr. 1886]

Q. Familiarize yourself. A. -- appropriate parts.

Q. Referring to the left-hand column, the paragraph numbered with the large No. 1, this states that the Public Utilities Commission outlined a campaign to enlist the aid of other Northern California Communities in actually getting your third carrier, right? A. Right.

Q. Now, will you tell us, please, what campaign was outlined? A. Well, I am certain that I merely stated that we should have a campaign to enlist aid of other Northern California communities.

The nature of this type of campaign is pretty well known. We try to get the more important communities to actually intervene in some cases and if not we ask them all to adopt resolutions by their governing bodies and to forward them to the Civil Aeronautics Board and ask that they be made a part of the record.

We ask that we get the Chamber of Commerce of each of the major cities, the County Supervisors and other laboring organizations to all adopt resolutions, submit them to the CAB telling of their interests in the outcome of the case and stating that San Francisco should get the service.

Q. Did you also wish them to submit these resolutions to the Senators and the Congressmen from their area? A. I don't recall. After all, the case was before the Civil Aeronautics Board at that time. We had gotten over our big hump. I know at the end we wanted the Congressmen to appear before the Civil Aeronautics Board.

Q. You are speaking now of oral argument? A. Oral argument, and that was done, I think. A great many of them did appear, and laying the ground work for that we undoubtedly informed them from time to time as to what was going on, but I don't think there was any request for Congressmen to do anything with the Civil Aeronautics Board at that time.

Q. Now, Mr. Martin, about the middle of the second column it states, "This airline campaign was suggested to the Commission by yourself," is that correct? A. I am sure it was.

Q. Now, will you tell us who, if anyone, you discussed such a campaign with prior to presenting this plan to the Commission? A. I doubt if I discussed it with anyone. This is pretty elementary, and I was president of the Commission, and this would be part of my duties. This would be the type of campaign that we would initiate in any route case that affects the City of San Francisco.

[7431]
[Tr. 1888]

It was done, and is done, and is being done right now in various route cases.

Q. First of all, is it correct that you suggested that Donald W. Cleary, the Sacramento Lobbyist, should be called to line up North State support? A. I undoubtedly did, because Mr. Cleary is well acquainted all through the Valley by virtue of his work, and he knows how to go about it, and that would be the most expeditious way of doing it.

Q. Would this also have been done with the State Legislature? A. I think he did ask the Governor to do something. I think the Governor did submit a letter, or something. I don't recall whether he asked the State Legislature itself to do anything.

After all, Southern California has more votes than we do, so I rather doubt that we would have taken the chance.

Q. Do you know whether, in fact, Mr. Cleary did devote himself to these efforts? A. I don't know whether Mr. Cleary did it or whether Mr. Messerschmidt, or Mr. Needles -- I don't know how it worked, but we did, and I am sure the record in the case will show that we did have support from all the communities and counties.

The record in the case will speak for itself as to what we got.

[7432]
[Tr. 1889]

Q. Speaking only now -- limiting yourself now to those groups which you wished to pass resolutions which would be sent to the Board, did you ever discuss this with anyone from American Airlines? A. Well, I am certain that the whole thing was discussed with American Airlines. They knew what we were doing, and we, I assume, knew what they were doing. We had to operate in public, so I am sure they knew what we were doing, but I am certain that they knew, and they asked and they were told.

They may have even made suggestions that we thought were helpful and adopted them.

Q. Was it customary for yourself or your office to make periodic reports to American Airlines informing them of what you had been doing? A. I would say that it was the other way around. They were asking me what I was doing. In this type of situation, and in all route cases, I have been associated with, the airline holds itself available to help the city, if we are working the same side of the street.

I have never reported to American Airlines. I would certainly be willing to discuss it with them at any time.

Q. Did you discuss this case with anyone in American Airlines in addition to the persons you have mentioned, Mr. Strickler and Mr. Shipley?

A. Oh, sure. Mr. Miller is the San Francisco Director of American Airlines. He is a good personal friend of mine, and I discussed it with him.

I discussed it with Mr. Jacob, and Mr. Smith came to San Francisco at least twice during this time and gave luncheons which I was invited to, and I discussed it with him.

Another man that worked for American Airlines, Tom Holbin, who was a classmate of mine. I saw him at our 20th reunion, and I discussed it with him, and I also discussed it with Tom Barbour.

This was a matter of general discussion and, of course, I discussed it with all the representatives of United, from Mr. Patterson down to Mr. Bissinger.

I also talked to Mr. Warren Burke.

Q. When you refer to Mr. Smith, do you mean Mr. C. R. Smith?

A. Mr. C. R. Smith, and Mr. Burck Smith, both.

Q. Limiting yourself first of all to conversations which you had with Mr. C. R. Smith concerning this nonstop case, how many times did you meet with Mr. Smith and discuss the case? A. Well, I recall one time when Mr. Smith came to San Francisco. Mr. Miller gave a luncheon for him at the Bohemian Club, and I imagine there must have been 50 people there. I sat very close to Mr. Smith, and I discussed it with him at that time.

[7434]
[Tr. 1891]

Q. Limiting yourself to that meeting, did it occur sometime in November of 1957? A. I just wouldn't have any idea of the date, but it was while the case was pending.

Q. Was it prior to your Civil Aeronautics Board conference? A. I just don't recall. It could have been before, or it could have been after.

Q. Do you know whether --

MR. WESTWOOD: Mr. Examiner, I suggest in fairness to the witness he be told the dates as they are perfectly clear, and there is no mystery about them. If he is going to be asked questions he ought to be able to place some of these things in his mind because he hasn't had a chance to refresh his recollection.

THE WITNESS: I don't recall the date, and I don't recall much of what was said, if anything, and they are not going to be very helpful to me.

MR. HUISENTRUIT: Is there an objection pending?

MR. WESTWOOD: I object to your further questions about the luncheon until the witness has been advised as to the dates and given a chance to place them in his mind.

They may or may not aid him, but it seems to me, in fairness to the witness, that that should be done.

MR. HUISENTRUIT: I believe the witness stated he attended two luncheons with Mr. Smith.

[7435]
[Tr. 1892]

EXAMINER STODOLA: Well, you are talking about the one particular luncheon at the Bohemian Club. I think this would be an appropriate time to let the witness know when that luncheon was held.

MR. HUISENTRUIT: I believe it was the first week of November, 1957. I think it was the 3rd, but I don't know the exact date.

MR. WESTWOOD: I think it was the 5th, but whether it was the 3rd or the 5th --

EXAMINER STODOLA: The first part of November.

THE WITNESS: It would be before I went East, about two or three weeks before I went to Washington. I remember the luncheon very well.

BY MR. HUISENTRUIT:

Q. Did you tell Mr. Smith at that time of your efforts to get congressional support for an expedited hearing? A. I undoubtedly did, and I undoubtedly discussed the matter with him as to where we thought we stood. We talked about what we could do, and I undoubtedly thanked him for letting Charlie Strickler do some of our bird dog work for us, and I think that this was the general discussion at the table.

That is all I remember, and I don't remember any specific statements made by him or me.

Q. Did you discuss with him the forthcoming conference

[7436]
[Tr. 1893]

before the Civil Aeronautics Board? A. I must have.

Q. Do you know whether the contents of your presentation was discussed? A. I am certain that it wasn't.

Q. It was not? A. We didn't get into any details like that in a large group.

Q. When was the date of the luncheon that you had this discussion? A. This wasn't a luncheon. I said I met with him twice, the next time he came -- perhaps it was another time he came out. I am pretty sure it was later because I wasn't president of the Commission then.

He gave a cocktail party at the Fairmont Hotel, and there were a large number of people there, and I just walked in and shook hands with him, and he said hello to me. He probably asked me how it was going, and that was about it, the substance of it.

I had one drink and left, I think. There may have been another meeting, or there may have been another luncheon, but the only two that I recall are the one big luncheon and the cocktail party.

Q. Mr. Martin, can you tell us how often you met with Mr. C. W. Jacob and discussed the nonstop case with him?

[7437]
[Tr. 1894]

A. Well, I can't give the exact number of times, but Mr. Jacob was out at one of the luncheons with Mr. Smith, as I recall, and I think that is the first time I ever met Mr. Jacob.

I was in New York, and I saw Mr. Jacob, and I think I had lunch with him.

Q. Can you tell us the year in which this luncheon took place? A. I really -- it might have been after this, but I don't know. I am trying to remember the times I have seen Mr. Jacob.

EXAMINER STODOLA: After what?

THE WITNESS: It might have been after I was president of the Commission. It might have been after -- it might have been in the year '58, but it may have been before.

EXAMINER STODOLA: Mr. Martin, do you recall the date of the cocktail party at the Fairmont when Mr. C. R. Smith was there?

THE WITNESS: No, I don't remember. I can tell you that it was after January 21, 1957, because -- no, after January 21, 1958, because that is when Mr. Fazackerly took over as president of the Commission, and I am certain that at that cocktail party Mr. Fazackerly was president, so that is the best I can remember.

[7438]
[Tr. 1895]

BY MR. HUISENTRUIT:

Q. Did you state that your luncheon with Mr. Jacob in Washington was sometime in 1958? A. I said it could have been. I think it was probably in 1957, but I don't recall.

Q. During this luncheon, Mr. Martin, did you discuss the fact that you had been making congressional contacts, either first of all to get an expedited hearing? A. I am certain I told Mr. Jacob what we were doing on behalf of the City. I am certain at all times all officials of American Airlines knew what we were doing. We made a point to keep in touch with them so that our wires wouldn't get crossed.

We made a point of informing them, and I am certain that I did discuss it with them. This was an open matter, as far as we were concerned. We discussed this with them in our public meetings, and we found nothing wrong with discussing it at any time.

Q. Do you recall whether Mr. Jacob gave you anything, any suggestions, or advised you how you could be more effective in your presentation of the problem of getting an expedited hearing for a third carrier? A. He may have, but I don't recall. My conversation with Mr. Jacob would obviously be of a more general nature than when I was talking with Mr. Strickler.

[7439]
[Tr. 1896]

Q. Did you meet with Mr. Jacob again after this luncheon which you have just described? A. I don't recall having met with him again, but I may have. He may have been in San Francisco and I may have seen him. I did not in New York.

Q. Mr. Martin, can you tell us after the Board order which severed and expedited the question of a third nonstop carrier, the issue -- it was January 13, 1958, and I will ask you if you can tell us if, after that, you or to your knowledge anyone else in the City of San Francisco sought congressional support concerning this case for others than those who appeared at the formal Board argument? A. I don't believe so. Again, I want to point out that on the 21st I stopped being president. The way this Commission works, the president is the working head of the Commission. Mr. Fazackerly took over and I don't believe that any attempt was made to approach or get congressional support until we asked them to appear at the oral argument.

I am not certain that, of that, but they must have been kept informed, but I don't think they were ever asked to do anything. I do not think there was anything that I thought they could do at that time.

MR. HUISENTRUIT: I have no further direct examination.

EXAMINER STODOLA: You may cross-examine. Mr. Harvey?

[7440]
[Tr. 1897]

CROSS EXAMINATION

BY MR. HARVEY:

Q. Mr. Martin, are you an attorney? A. Yes, sir.

Q. Are you a practicing attorney in the City of San Francisco, in addition to your responsibilities with the Public Utilities Commission? A. Yes, sir.

Q. If I may, I would like to clarify this question of your oral presentation before the Board. Was it your suggestion to Congressmen that they arrange this opportunity for you to present your views to the Board? A. This was not my testimony. I believe that I was informed, and I think it was by Senator Kuchel's office, that there was a procedure whereby cities were entitled to ask for a formal conference with the Board to discuss their problems.

It was this procedure that we were following.

Now, I was under the impression that you could discuss specific problems with them, and I went back there intending to discuss this specific problem.

I got there that morning, and was told that this was not the ruling of the Board, and that you could only discuss general situations, but the idea came I believe from Senator Kuchel.

EXAMINER [STODOLA]: Did you request the meeting?

THE WITNESS: We requested the meeting.

EXAMINER STODOLA: The Public Utilities Commission requested the meeting?

THE WITNESS: Yes, sir.

EXAMINER STODOLA: By letter?

THE WITNESS: I don't believe so. I am not certain, but I believe we asked Senator Kuchel's office to arrange the meeting for us, and I believe Mr. Small in Senator Kuchel's office phoned and arranged the meeting.

EXAMINER STODOLA: You may proceed, Mr. Harvey.

BY MR. HARVEY:

Q. When did you first become aware that the Board had granted this opportunity to you? A. I can't tell you that, but it must have been very shortly before the Commission met and adopted the resolution and appropriated the money for me to go back there. It must have been the end of October or the beginning of November of 1957.

Q. Now, you have spoken about this hearing, and you said that it was a crucial time as far as the City was concerned in connection with the problem of nonstop service. Was it crucial because the Board had set the date of December 1st as the date for staff reports? A. I think it was crucial that San Francisco get this service, and it was crucial because we just invested another

$25 million in our airport, and we could see Los Angeles with jets, and they were a year ahead of us.

We could see the effect that this was going to have on foreign supply carriers when they were seeking a West Coast base, and in that sense it was crucial. We had to win, and that was what I was talking about.

Now, I don't recall anything particularly about that December 1st date.

Q. Do you know when it was first determined that you were going to ask for this opportunity to present your views to the Board? A. I do not; I don't remember.

Q. You mentioned during your testimony that Mr. Cleary was going to Washington to contact Congressmen to see if he could get support for the City of San Francisco.

You also mentioned that part of his duties would be to contact New York Congressmen? A. Yes.

Q. Mr. Cleary is a lobbyist before the State Legislature in California, is that right? A. The City's legislative representative in Sacramento.

Q. And he is not a Washington representative for the City? A. He is not, no.

Q. What particular New York Congressmen, if you know,

would Mr. Cleary call upon? A. I don't know. He did talk to some in the New York delegation to find out what they were doing on behalf of the New York Port Authority, but I don't recall who it was.

Q. Do you know whether American Airlines at that time was contacting New York Congressmen? A. I believe they told me that they had discussed it with the Port of New York, the Port Authority.

Q. Members of the New York Congressional delegation? A. I would think so, but I am not certain of that.

Q. The last series of questions that counsel for the Board posed to you with respect to any congressional activity that you might have solicited after the Board formally instituted this proceeding in January of 1958, and up to the time that the initial decision came out and the date was set for briefs to the Board and subsequent argument, you were not aware of any activity on your part or the Public Utilities Commission as to enlist the aid of Congressmen with respect to this matter then pending before the Board; is that true? A. Well, to the best of my recollection as far as my activities were concerned, as I say, I was no longer president of the Commission. This -- there may have been something but I don't recall it.

Q. Would you refer to pages, page 236 of Volume 1 of the Joint Appendix. Do you have that before you?

[7444]
[Tr. 1901]

A. Yes.

Q. Also refer to pages 237, 238, 239, 240, 241, 243, 245 and 247.

(Short pause).

Have you had a chance to do that? A. I looked at some of them, but I assume that you are going to question me about specific ones.

Q. Well, if you will note, most of those pages that I have referred to contain copies of correspondence between the Civil Aeronautics Board and various congressional members from California, and also Senators from California.

You will also notice, I think, that the dates on the various correspondence is in the month of February, 1959? A. That is right.

Q. Did you have anything to do with soliciting this support from the various members of congressional delegations from California? A. Well, there is one thing missing, and that is the Mayor's letter which doesn't appear, and to which all these refer to. Is that in the record, may I ask?

MR. HUISENTRUIT: BOE-72.

THE WITNESS: Yes, I recall this. I suppose that I was in on the conference with Mr. Fazackerly and the Mayor which resulted in this letter. This was not a plea for support; it was merely for action.

[7445]
[Tr. 1902]

Again, we had gotten an expedited hearing, but the case did not seem to be proceeding very expeditiously, at least not expeditiously enough for us. When the jets started to serve Los Angeles, this apparently is what triggered this letter, and it was not a plea in support of San Francisco's position, but it was a plea, "Couldn't we please find out where San Francisco stood?"

I recall the sending of this letter. When you asked if I had anything to do with, I agreed it was a wise thing to do.

BY MR. HARVEY:

Q. If this had been a matter pending before a Court of Law, would you have thought such a procedure was a wise thing to do? A. I know in California we have a limitation in how long the Judge can keep the case under consideration, so I probably would have felt entitled to do it.

Q. You thought this was perfectly proper, and it would have been proper in a court of law, also? A. I felt it was proper in this case. After all, we are representing 800,000 people in the City and County of San Francisco, and millions more that use the airport. We felt that these people were being hampered, and we felt that the travelers were being hampered. The City's interest was not being protected, and if were overeager I am certain that we are sorry, but from our point of view the results justified

[7446]
[Tr. 1903]

it. We had to get action. We were in danger. If you don't protect your airport and keep pushing forward, you soon get behind the train, and our job was to get the best service pattern in San Francisco that we could, and we did everything that we could to do it.

[7447]
[Tr. 1904]

Q. And the results justified the means, is that what you mean to say? A. I am saying that when the Board got the facts that they realized that we were entitled to it, and they gave it to us.

Q. You had some doubt as to whether the description of the activities of the, of yourself and this Mr. Cleary in this case could be described as "lobbying?"

How would you describe the activities of Mr. Cleary in Washington with respect to lining up Congressional support? A. Well, I assume that again from what Mr. Cleary reported to me that he went to the various Congressmen and showed them where this service was necessary for their constituents.

Q. Do you know whether Mr. Cleary advised any of the Congressmen to make telephone calls to the Civil Aeronautics Board? A. I was not present --

Q. -- with respect to this matter? A. I was not present and I don't know what Mr. Cleary -- he has testified and I am sure he can give you an answer to that question. I was not present.

MR. HARVEY: No further questions. Thank you.

EXAMINER STODOLA: Mr. Bernstein?

[CROSS EXAMINATION]

BY MR. BERNSTEIN:

[7448]
[Tr. 1905]

Q. Mr. Martin, do you know Mr. Miller of the San Francisco Chamber of Commerce? A. I do.

Q. In the early part of 1957, did you discuss with Mr. Miller the problem of additional nonstop service from San Francisco to New York? A. Well, I don't remember exactly when I had my first discussion with Mr. Miller, but I had many discussions with Mr. Miller and Mr. Fox about the problem and about the problem of the Chamber with respect to this service, because it is a well known fact that United Air Lines is a very active and good citizen here and they are a very active member of the Chamber and it is very good to get support from the Chamber for actions not favorable to United, and this is a matter I was concerned about and I did discuss it.

Q. You sought in your discussion with Mr. Miller the support of the Chamber for the position the Public Utilities Commission was taking? A. I certainly did.

Q. Did you discuss with him the seeking by the Chamber of support of other Chambers in the Bay Area? A. I did.

Q. Can you tell us about when this might have been -- place it before or after the filing of the motion to expedite which was filed in May of 1957?

[7449]
[Tr. 1906]

A. I would say -- well, we discussed the general problem with Mr. Miller from early 1956, when I first became conscious of the thing.

The specifics of getting people actually going out and getting support were undoubtedly after we had passed our resolution and intervened in this case.

Q. And then you asked Mr. Miller to attempt to solicit the support of other Chambers in the Bay Area? A. That is right.

Q. Is that correct? A. Yes.

Q. In your discussions with Mr. Strickler or Mr. Shipley about this, did you discuss the possibility of seeking the aid of the Chamber, of the San Francisco Chamber in this respect? A. Undoubtedly.

Q. Did you in any of your discussions with Mr. Miller, do you know of any of the American representatives, do you know if any of the American representatives, Mr. Strickler or Mr. Shipley or any other American personnel was present? A. I don't recall any discussions between Mr.

Miller and me where an American representative was present except at the hearings or at the Commission meetings where everybody . . .

There may have been a case, but I don't recall it and I doubt that this was the case.

Q. In your discussions with American personnel of

[7450]
[Tr. 1907]

support of the Public Utilities Commission for the action that American was going to take in filing this motion to expedite, at or about that time did you also discuss possible support that you would seek from the Chamber of Commerce of San Francisco? A. Well, I don't recall what was said at each discussion. The pattern of these cases is so well known, the thing is so repetitious of past cases that we obviously all knew we would have to have the Chamber's support or wanted it.

Whether we specifically discussed it or not, I don't recall.

Q. Well, then American obviously wanted the support and communicated that to you and American knew that you were going to seek Chamber support, isn't that so? A. Well, they would have been very silly if they didn't realize we were going to seek Chamber support.

Q. Well, did they ask you to seek Chamber support? A. You mean did they suggest to us --

Q. Yes, sir. A. -- that we seek?

Q. Yes, sir. A. No. We would do that entirely on our own motion. This would be one of the first things we would do in every case because the Chamber must file a brief and --

Q. Did you advise Mr. Shipley or Mr. Strickler or any

[7451]
[Tr. 1908]

other American personnel that you were going to seek Chamber support? A. I undoubtedly told them that this would be one of the things, things I would do and I would use the bad word "Lobbying" to get it done and I did.

Q. Now, you spoke of Mr. Strickler doing some of your leg work. Did he furnish that leg work during the period from May 1957 when American's motion to expedite was filed to June of '57 when the motion was denied in your seeking Congressional support for American's motion? A. Well, he furnished leg work during that period.

Q. Yes, sir. A. You've got two questions there.

He certainly did furnish leg work during that period but I believe that the Commission made all its own contacts with Congressional people.

Now, what American did, I am not even certain that I ever knew, but I was certainly of the impression that a public body asking for support for its citizens is a lot more effective than any other thing and I made certain we asked for our own support, and I think the letters in the record will back that up.

Q. Did you discuss with American that it would be more effective if the City sought Congressional support alone and without apparent participation by American?

[7452]
[Tr. 1909]

A. There was no question of apparent participation by American.

The City was going to seek Congressional support and it did seek Congressional support. I am a semi-politician by avocation and this would be one of the first things that I would think of, and we didn't ask American's permission or we didn't tell them what to do, who they should see.

We told them what we were doing. We discussed it with them, but I can't get over the impression that I had anyway was that I was running this show and from the City's point of view and not American's and I have taken credit for it ever since.

I feel very strongly about this.

Q. I certainly did not mean to detrack from the contribution you made, Mr. Martin.

One last question: The little trade journal that circulates in

Washington that you referred to, do you mean the Aviation Daily? Is that what you had reference to? A. I don't remember the name but it was a small yellow or orange sheet, or was that day.

MR. BERNSTEIN: That is all I have.

EXAMINER STODOLA: Mr. Holm?

MR. HOLM: I have no question.

EXAMINER STODOLA: Mr. Jones?

MR. JONES: No questions.

[7453]
[Tr. 1910]

EXAMINER STODOLA: Mr. Westwood?

[CROSS EXAMINATION]

BY MR. WESTWOOD:

Q. Did you ever see any transcript of any other City's conferences with the Board comparable to your conference of December 1957? A. I don't recall any, Mr. Westwood.

MR. WESTWOOD: May I see one of the exhibits, you don't have reproduced, that lobby newspaper story?

BY MR. WESTWOOD:

Q. My recollection is that you stated that the decision to seek this conference with the Board, with the Civil Aeronautics Board of December 1957 and the arrangements for it had been made just prior to the time that the appropriation was made by the Board of Supervisors for the expense of the trip, is that correct? A. Well, I have no independent recollection of this, but it is just natural that this is the course of events that would follow. We would arrange for the conference; we would immediately seek appropriation for expenses.

Q. Well, you seem somewhat uncertain as to whether you had discussed this December conference or proposed December conference with Mr. C. R. Smith at the luncheon, in early November of 1957.

Now, what I really want to know is whether you do remember that you discussed with him your proposed conference

[7454]
[Tr. 1911]

with the Board at that time.

Now, the newspaper stories' feeling about the appropriation for the trip east for this conference are dated November 21st, 1957. That was -- here, I will show them to you. A. Yes, I recall.

Q. Now, the luncheon with Mr. Smith was, I think it was on November 4th, but it was November 3rd, 4th or 5th, 1957.

Now, all I want to know is whether you remember that you did discuss with Mr. Smith the proposed meeting with the Board? A. Well, I think I have testified that I don't remember what was said specifically at this luncheon.

However, I will say this, that if we had requested the hearing before the lunch with Mr. Smith, I undoubtedly discussed it with him.

Q. I understand that. A. Yes, but I don't remember specifically.

Q. You don't know whether you had requested the conference with the Board prior to the luncheon with Mr. Smith? A. I have no way of knowing the exact date that we did that.

I imagine that the Board's records must show when that conference was requested.

Q. You also testified, Mr. Martin, in connection with BOE-91, which is a newspaper story --

[7455]
[Tr. 1912]

A. Yes, I still have it.

Q. -- newspaper story telling of your statement on a proposed campaign to get support in the CAB proceeding.

You testified, as I remember, that the nature of this campaign and the nature of the support that was sought in the campaign is reflected in the, would be reflected in the CAB record in the case.

Is that substantially -- A. That is my testimony, yes.

Q. And I take it then that you do not refer to a campaign to get support which would be registered in some way outside the record of the case? A. I did not refer to that, and I don't know of any such support that was either solicited or given.

[7456]
[Tr. 1913]

Q. And any campaign to seek resolutions of Chambers of Commerce or city bodies or labor organizations, or anything of that sort, and to have those resolutions sent to the CAB would not have involved, as I understand your testimony, any failure to serve copies of those resolutions on all parties to the proceeding? A. Well, it would certainly not have -- I don't know that everybody that passed these resolutions knew all the rules of the Board, but certainly we didn't ask them to only give it to the Board and, after all, I think this probably shows that maybe a lot of the rules of procedure aren't as well known or weren't as well known then as they are now, but we assumed that everybody would do things in the way it should be done.

MR. WESTWOOD: Mr. Cleary is going to be a witness here, is that right?

MR. HUISENTRUIT: That is right.

MR. WESTWOOD: I have no further questions.

EXAMINER STODOLA: Any redirect?

MR. HUISENTRUIT: Yes.

REDIRECT EXAMINATION

BY MR. HUISENTRUIT:

Q. Mr. Martin, by support within the record, by record, do you include the Board's public correspondence file? A. Yes. I believe that that is a public record.

[7457]
[Tr. 1914]

Q. And, Mr. Martin, could you tell me if it is possible to ascertain the date it was decided upon to have a CAB conference?

MR. HOLM: Now, if Your Honor please, I think that counsel has had ample opportunity on direct. This is nothing new that he is being -- that he is bringing up here now, and this thing has been gone over time after time, and I object to it as incompetent, irrelevant and immaterial.

MR. HUISENTRUIT: Mr. Examiner, if I may say, Mr. Westwood on his examination of this witness brought out the fact that if it can be determined the date in which the Conference was decided, or which it was decided to have a conference, he could tell us whether he discussed it with Mr. C. R. Smith.

I think the question is entirely proper.

EXAMINER STODOLA: Mr. Holm, the question is entirely proper in this case.

THE WITNESS: I think I stated that I don't know of any way that I have in setting that date, and the only evidence that I would rely upon is the Board's record of when the conference was requested, and I assume that the conference was requested practically immediately after the decision was made to seek it.

BY EXAMINER STODOLA:

Q. Mr. Martin, wouldn't the officers of the PUC have some records which would show when requests were made? A. Sir, you ought to go up to our office and take a look, no.

[7458]
[Tr. 1915]

Q. Well, didn't your offices have a file on this case, the nonstop case proceeding? A. Well, I think the Government came in and took a look at what files we had. If it was a telephone call, there would just be no record of it at all. If there was a letter there would be a record, but a telephone call, you would just make the call, sir, and that would be that.

Q. Well, as important as this conference was, it wouldn't normally be made by telephone, the request therefor. A. Well, the only thing I can say is I reviewed what file we had, and I didn't see any reference to this conference in the file, so it may very well have been by telephone because I understand now what one of the previous questions was, the December 1st date.

I am certain that we did. You see, we wanted this conference before the date the Board had set for the Examiner's report.

EXAMINER STODOLA: You mean the staff report?

THE WITNESS: The staff report, and we wanted to have a chance to present our case as forcibly as possible to the Board before that.

BY EXAMINER STODOLA:

Q. Mr. Martin, you also indicated there was some possibility that someone in Washington made a request for the

conference and telephoned you the date of the conference? A. This I believe is what happened, sir. I just -- I am certain that we didn't phone out here. We don't know anybody at the Board. We wouldn't know who to telephone to set up a conference like that, and I am certain, as certain as you can be, that Mr. Small in Senator Kuchel's office, set up that conference.

Now, you might find out that Senator Knowland's office or Jack Shelley's office did it, but I certainly have a feeling it was one of our Washington representatives that set it up, and I include Senators.

MR. HUISENTRUIT: Mr. Examiner, I wonder if it would be proper for me to request counsel for the City of San Francisco if he could make a search of the records, if it is not too burdensome, to determine whether a letter was written to either Senator Kuchel or Mr. Small setting up such a conference or requesting such conference.

MR. HOLM: I will be very glad to when I report back.

EXAMINER STODOLA: Do you have anything further, Mr. Huisentruit?

MR. HUISENTRUIT: One other question.

BY MR. HUISENTRUIT:

Q. You mentioned that you knew Mr. Miller in the San Francisco Chamber of Commerce. A. Yes, sir.

[7460]
[Tr. 1917]

Q. Did you ever discuss any congressional contacts which the San Francisco Chamber of Commerce might make to get support for an expedited hearing? A. I don't believe so. I think we felt that the City was the best one to make those right from the beginning, and I don't think we discussed it with the Chamber at all.

We probably told them what we were doing. We informed everybody, but we didn't ask their help.

Q. Did you ever discuss with anybody from the Downtown Association whether they were writing congressional letters to get support for an expedited hearing? A. The same thing would be true for the Downtown Association. We didn't ask them to write their Congressman, I don't think. We felt that the people's representatives should contact the people's representative.

MR. HUISENTRUIT: Thank you very much.

EXAMINER STODOLA: If there is nothing further --

MR. HUISENTRUIT: Mr. Examiner, I would like to move the receipt into evidence at this time of Exhibits BOE-86 through 91.

EXAMINER STODOLA: Is there any objection to the receipt of those exhibits?

(No response).

EXAMINER STODOLA: Hearing none, each of those exhibits enumerated by counsel is hereby received.

[7461]
[Tr. 1918]

(The documents referred to, heretofore marked Exhibits Nos. BOE-86 thru 91, inclusive, for identification, were received in evidence).

EXAMINER STODOLA: If there is nothing further, Mr. Martin, you are excused, and thank you very much for your testimony.

THE WITNESS: Thank you.

(Witness excused).

EXAMINER STODOLA: The hearing is now recessed until 2:15 p.m. in this same room.

* * * * *

[7462]
[Tr. 1919]

Whereupon,

GEORGE CHRISTOPHER

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYALL:

Q. I believe your name is George Christopher and you are Mayor of the City and County of San Francisco, is that correct, sir? A. Yes.

Q. And how long have you been Mayor, sir? A. Four years and seven months.

Q. You took office sometime in 1956, then, I believe. A. January 8th of '56.

* * * * *

[7472]
[Tr. 1928]

Q. Now, when you wrote this letter appearing on page 401 of the Joint Appendix, or at any time prior to that time, had anyone on your legal staff, or otherwise, brought up the question of whether this was a proper way to communicate with the Civil Aeronautics Board pertaining to a motion before it? A. No such thing was brought to my attention. I certainly didn't consider it to be wrong to contact any public agency on any matter pertaining to the City's interest.

THE WITNESS: And I must say, Mr. Examiner, I have done that many, many times in the past, and hope to be able to do it in the future.

I think it is part of my job as the Mayor of San Francisco to do that for the interest of my city, and I feel I can use every legitimate means possible.

BY MR. ROYALL:

Q. But I believe your answer is that no one on your staff raised the question of propriety or impropriety of any such communication to you, sir? A. No, sir.

* * * * *

[7474]
[Tr. 1930]

Q. In this same connection I will ask you whether or not there was any official representative or employee of American Airlines who consulted with you about the transmission of such letters or communications to the Board? A. No, not at all. I wasn't interested in American Airlines. All I was trying to do was get a hearing to get a third nonstop route.

American Airlines didn't concern me a bit.

* * * * *

[7479]
[Tr. 1935]

Q. Yes. A. This apparently came to me the same day, the same day I signed it, and this would come to me normally a few days prior to the Monday meeting of the Board of Supervisors. I don't have any recollection at this moment as to what American or anyone else was doing.

Q. I call your attention to the fact that shows the president of the Board of Supervisors, County of Blank, City of Blank, and State of California.

I will ask you what the purpose was in drafting that. Was that to be sent to more than one county body, and if so what bodies was it to be transmitted to by you, sir? A. Again I say that I felt it was my duty to solicit support from the entire Bay Area, asking them to join in with us in expediting this case. If this is the letter that went to these people, and I assume it is, this was intended to go to the various Boards of Supervisors in the Bay Area.

Q. I see. Now, I call your attention to a statement

[7480]
[Tr. 1936]

appearing on page -- the next to the last paragraph on page 2 of BOE-40, wherein it states:

"Would you kindly forward to me five copies of your adopted resolution." A. Yes, sir.

Q. How was that arrived at, and for what purpose was such resolution to be put, if they were received by you, sir? A. I think for the ultimate purposes I have indicated in my correspondence here of transmitting them to members of the Civil Aeronautics Board.

Incidentally, I may say it is a very normal function in the City and County of San Francisco.

Q. Was this letter in fact transmitted to the various governing bodies, the Board of Supervisors, in the area in and around the San Francisco Bay Area, to your knowledge, sir? A. Yes, sir.

* * * * *

[7489]
[Tr. 1945]

CROSS EXAMINATION

BY MR. HARVEY:

* * * * *

[7490]
[Tr. 1946]

Q. Do you recall what your express purpose was at that time in writing and preparing this document and circulating it to the parties or persons that you did? A. Yes. This is a routine matter for us, that is, the Mayor's office in San Francisco. Whether we are looking for new air line routes -- I don't know if I am answering this properly, Mr. Examiner.

I am trying to do it in my own words.

EXAMINER STODOLA: You may proceed.

THE WITNESS: It is my policy as the Mayor of San Francisco to do all that I can to further the interest of my City. Whether it is getting a baseball team or getting a new air line route or whatever it is that we are seeking, we seek the support of our surrounding Congressmen and public officials.

In circulating this particular letter, I solicited the help and cooperation of various public officials surrounding San Francisco Bay.

* * * * *

[7537]

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August 24, 1960

* * * * *

[7541]
[Tr. 1995]

MR. WESTWOOD: Mr. Examiner, I would like to make a brief

[7542]
[Tr. 1996]

statement which may save us all a lot of time. I think we are running into time problems here.

American Airlines admits for the purpose of this case that an employee of American Airlines drafted the form of Chamber of Commerce resolution about which there has been some questioning in the hearing.

Your Honor will recall that a number of these resolutions are in identical form.

I refer just as a random example to a resolution of the Mill Valley Chamber of Commerce, which appears on bracket page 438 of Volume 1 of the Joint Appendix. I don't pick that one out as having any particular significance. It is simply a sample.

My recollection, Mr. Examiner, is that there are several of these area Chamber of Commerce resolutions which are in either identical or substantially identical form.

Now, we admit that that form was drafted by an employee of American Airlines. We admit further that it was transmitted to the Chambers of Commerce which adopted that form by American, and I just invite Your Honor's attention to the last paragraph of that form resolution which states that it should be filed with the Civil Aeronautics Board, et cetera.

Now, that was in the form as drafted.

EXAMINER STODOLA: By your men?

MR. WESTWOOD: By American Airlines, that is right.

[7543]
[Tr. 1997]

EXAMINER STODOLA: By American Airlines.

MR. WESTWOOD: Now, also, Your Honor, just to refresh all our recollections, Your Honor will recall BOE-44, which was the memorandum dated May 9, 1957, which was introduced into evidence in connection with the testimony of Mr. Burck Smith. That is a memorandum which indicated, which Mr. Burck Smith said he thought he received from Mr. Strickler, and that indicated that through the zone manager and sales representative of American an effort would be made to get in touch with some or a substantial number of the Bay Area Chambers with a view to asking them to adopt a resolution in support of this hearing proposal, and I invite your attention to the next to the last paragraph in that memorandum which obviously contemplated that it would be suggested to those Chambers that the resolution which was proposed, copies of it should be sent to the Civil Aeronautics Board and to members of Congress.

EXAMINER STODOLA: Well --

MR. WESTWOOD: I am talking about 1957.

In Mr. Startup's testimony, I think it is all clear, as a matter of fact, or reasonably clear from Mr. Strickler's and Mr. Startup's testimony.

Now, Mr. Startup's testimony I believe was somewhat more specific as to the time. He said that as best he could recall it this effort occurred from about mid-May 1957 on for perhaps two or three or four weeks.

[7544]
[Tr. 1998]

I don't know that he was definite about the terminal date. I simply refer to his testimony by way of pinpointing the time. I don't think there is any particular doubt about it.

* * * * *

[7593]
[Tr. 2046]

MR. ROYALL: I believe with possibly one exception this afternoon that we will not bring on any further witnesses relating to the Chamber of Commerce.

I believe I am correct in that. I think perhaps one more would conclude our presentation in that regard.

EXAMINER STODOLA: Well, perhaps I can bring up one thing. As I understand it, the allegations of TWA and United made to

[7594]
[Tr. 2047]

the Civil Aeronautics Board and which the Court of Appeals considered do not charge any irregularities on the part of any individual Board member, either past or present, or on the part of any CAB staff member, either past or present.

Isn't that correct?

MR. BERNSTEIN: That is correct, sir.

EXAMINER STODOLA: Mr. Harvey?

MR. HARVEY: That is correct.

EXAMINER STODOLA: Does TWA or United or the Government intend to call any Board member, either past or present, or any Board staff personnel which may have been connected in any way with this non-stop proceeding for a possible showing that any undue pressure or improper influence was exerted upon any one such person?

Mr. Harvey?

MR. HARVEY: We do not intend, so far as I know, to call any Board member or staff member of the Civil Aeronautics Board.

EXAMINER STODOLA: Mr. Bernstein?

MR. BERNSTEIN: The response to your question is no.

EXAMINER STODOLA: Mr. Royall?

MR. ROYALL: The Bureau has no such intention, because no such charges were made, and we do not intend to call any of those persons you enumerated, sir.

EXAMINER STODOLA: Is it true, then, that TWA and United do not feel that any such persons should be called for examination as to whether any improper pressure or any improprieties were attempted upon any such persons and, if so, whether any such possible activities may have affected their duties or decisions in the non-stop proceeding?

[7595]
[Tr. 2048]

(No response.)

EXAMINER STODOLA: Perhaps you can read that back, Mr. Reporter, if it isn't clear.

(Record read.)

EXAMINER STODOLA: Mr. Harvey?

MR. HARVEY: Well, I said we do not plan to call any Board members or any staff members of the Board and, as I recall the briefs of TWA, there were no charges by TWA as to any impropriety on the part of any individual Board member or of a member of the Board staff.

EXAMINER STODOLA: My question was perhaps somewhat different. Do you think that any such person should in any event be called for testimony, any Board members or any Board personnel connected with the non-stop proceeding?

MR. HARVEY: Well, we don't intend to call them. Certainly I think it is encumbent upon us if we were going to make a charge of that nature that we would have to call these people, but since we have made no charge on that I can't see any purpose in our calling them.

EXAMINER STODOLA: That answers my question.

[7596]
[Tr. 2049]

Mr. Bernstein?

MR. BERNSTEIN: You referred to attempts. I suppose it is a question for argument whether attempts have been shown in the form of ex parte communications as such, but aside from that, absent any knowledge which the Government investigators may have which is not available to us, United does not believe that any such people should be called.

EXAMINER STODOLA: Well, even with respect to the matters already in the record, is it your feeling that no such person should be called? And I am talking now about the Board members or personnel connected with the non-stop proceeding.

MR. BERNSTEIN: Based on our knowledge of what is in the record now, we do not think so.

EXAMINER STODOLA: Mr. Royall?

MR. ROYALL: Our investigation has revealed no cause for calling the Board members, and as I said before there was no charge made as such, and our investigation does not reveal any reason, in our opinion, why they should be called or whether it will add in any respect to the charges made.

I think there was an actual disavowel of any impropriety on the part of any Board member in the proceeding by the parties.

Am I not correct on that?

MR. BERNSTEIN: That is correct.

EXAMINER STODOLA: Any other comments on my inquiries of

[7597]
[Tr. 2050]

the last few moments?

MR. BERNSTEIN: Excuse me, sir, the only question left with me is this question of attempt.

This record may show attempt --

EXAMINER STODOLA: Well, I am only concerned now with the problem of whether any Board member, past or present, or any Board staff member, past or present, should be called to testify in this reopened proceeding, and to that your answer is, "No."

MR. BERNSTEIN: I stand on my prior answer.

EXAMINER STODOLA: You stand on your prior answer?

MR. BERNSTEIN: Yes, sir.

EXAMINER STODOLA: Does the Department of Justice have any position on this?

MR. HUFFORD: No, sir.

* * * * *

[7667]

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August 25, 1960

* * * * *

[7681]
[Tr. 2132]

Whereupon,

KENNETH W. BROWN

was called as a witness, being first duly sworn, was examined and testified as follows:

EXAMINER STODOLA: You may take the stand please, sir.

[7682]
[Tr. 2133]

DIRECT EXAMINATION

BY MR. HUISENTRUIT:

Q. Will you please state your name and address, sir? A. My full name is Kenneth W. Brown, 825, 28th Avenue, San Mateo.

Q. And you are associated with the San Mateo Chamber of Commerce? A. That is correct.

Q. What was your position with the San Mateo Chamber of Commerce in May of 1957? A. Secretary-manager.

*   *   *   *   *

[7684]
[Tr. 2135]

CROSS EXAMINATION

*   *   *   *   *

[7685]
[Tr. 2136]

BY MR. WESTWOOD:

Q. Mr. Brown, the resolution directs that copies of the Chamber's action be sent to the major air lines at the International Airport.

Did that include TWA and United? A. If I may see that letter, I can tell you to whom the copies were sent.

(Short pause)

THE WITNESS: Yes, TWA and United.

*   *   *   *   *

[7687]
[Tr. 2138]

Whereupon,

C.W. JACOB

called as a witness and, having been first duly sworn, was examined and testified as follows:

*   *   *   *   *

[7688]
[Tr. 2139]

DIRECT EXAMINATION

BY MR. ROYALL:

Q. Please state your name and address, sir? A. My name is C.W. Jacob, 69 Paper Mill Road, Plain Dome, New York.

Q. I believe you are an official of American Airlines, are you, Mr. Jacob?

[7689]
[Tr. 2140]

A. Yes, sir.

Q. In what capacity do you serve, sir? A. My title is Sr. Vice-President and Secretary.

Q. And how long have you been occupied in that position with the Airlines, sir? A. Something like seven or eight years.

* * * *

[7693]
[Tr. 2144]

Q. Very good, sir.

Now, during the period that I mentioned, that is, from just prior to or from the date of filing the motion on May 3rd,

[7694]
[Tr. 2145]

1957, and until June 26, 1957, at which time the Board denied American's motion, what instructions, specific instructions, if any, did you give to Mr. Strickler as to what his duties would be in relation to American's motion? A. Well, I gave him very specific instructions on that. I told him I wanted him to go up and to offer any aid that he could give in the community of San Francisco in moving ahead with this case, not to press himself on the community, but we have often found that in these cases that statistical data and facts are available to us that are not always available to the communities.

I wanted him to make himself available for the purpose of providing that information. A very, further very important point in my mind at the time was that American Airlines was not well known in San Francisco. We were literally doing business in back rooms in this City.

Out at the airport we had an old terminal building then. That was before the present one was built and I was shocked upon going into the place to find that I couldn't even find American Airlines. It was over in a side room, an annex, in a little tiny corner and that was typical of the sort of representation we had in this City.

We had a ticket office that was off on a side street, and our other facilities here were not prominent in the public eye.

[7695]
[Tr. 2146]

So, aside from the fact that we were doing very little business here and aside from the fact that our facilities were not in keeping with the facilities that we have in most places on American Airlines' system, I wanted Mr. Strickler to begin to tell as many people as he could in this community something more about American Airlines and get them to know more about what kind of a company American Airlines is.

So that was a very important part of his assignment and I felt that was important whether we won the case of non-stop in removing the restriction or not.

* * * * *

[7704]
[Tr. 2155]

Q. I will ask you, Mr. Jacob, if you attended a luncheon or a dinner with Mr. C.R. Smith on or about November 3, 1957, in the City of San Francisco. A. I attended a luncheon with Mr. C.R. Smith in San Francisco. It may have been on November 3rd. My impression

[7705]
[Tr. 2156]

is it was November 12th, but it was in that immediate period.

Q. Was that the occasion, if you remember, which Mr. Smith was reported in the press as stating that San Francisco wanted this non-stop authority or additional air service that if they wanted it they would have to keep hammering for it? A. I did not hear him make such a statement.

Q. You did not, sir? A. No, sir.

Q. Were you present -- no, strike that.

Did Mr. Smith in your presence confer with any members of the press? A. Yes, sir.

Q. To your knowledge? A. Yes, sir.

Q. I beg your pardon? A. Yes.

Q. You did? A. Yes.

Q. And if you recall, what was the subject of his comments to the press? A. A few press people dropped in sometime in the afternoon following the luncheon. Some people who had not been at the luncheon, his comments were entirely informal.

I do not recall whether he made any prepared comments. He was there for the purpose, as I recall it, of answering

[7706]
[Tr. 2157]

questions from some of the group who were very interested to know how the jet machine was coming along, and Mr. Smith had just returned from Seattle where he had been observing the progress of the 707 transport, and his remarks, the questions and answers were very largely to do with this new flying maching.

* * * * *

[7707]
[Tr. 2158]

(Question read.)

THE WITNESS: Well, in the first place, Mr. Taylor would have two jobs to do in relation to the New York-San Francisco Non-stop Case. Back in the early period when Mr. Shipley was in charge of the office in Washington, and Mr. Taylor reported to him, Mr. Taylor at that time was the man whose principal duties were legislative.

I would expect Mr. Taylor as part of his normal duties to tell interested congressmen about this action that we were seeking before the Civil Aeronautics Board. I would have

expected him to tell principal congressmen from California, and I would expect him to tell the principal congressmen and senators from New York that we were seeking this right.

Now, subsequently, when the case was set down for hearing, whatever date that was, I remember discussing with Mr. Shipley and Mr. Strickler, and with Mr. Taylor, the fact that this was in a new posture, and that they should take that into account, insuring that the rules of the Board, as they applied to cases under consideration, be observed.

I did not feel those instructions were particularly necessary because those people knew -- they knew that as well as I knew it, and they had just as much of a consciousness and awareness of living up to the Board's principles as I did, but I told them nonetheless.

Now, proceeding beyond that point, I would have expected Mr. Taylor at the time this matter was set down for oral argument, or at least in anticipation of that fact, that it was going to be set down for oral argument, to make whatever contacts were appropriate, to inform congressmen and senators again about the status of this case, so that those of them who wished to appear at oral argument could and would do so.

BY MR. ROYALL:

Q. Prior to the Examiner's initial decision, would your instructions have been to Mr. Taylor that he would solicit the aid of congressmen to write the Board?

A. No, sir.

Q. About the case? A. No, sir.

Q. Now, Mr. Morris Shipley, I believe, was the predecessor of Mr. Taylor in Washington during the time this motion of American's was pending to sever and expedite New York-San Francisco non-stop problems.

Would you have expected Mr. Morris Shipley to ask congressmen to write the Board in the interest of getting the motion granted by the Civil Aeronautics Board? A. No, sir. I never instructed him to do so, and I didn't instruct Mr. Taylor to do so, and I am not aware that either one of them ever did so.

Q. Did you instruct them to the contrary, that is, that they should not do so? A. I don't remember the question ever coming up. We expected to have our relations with congressmen on two plains. The first is that we have an obligation to tell a congressman what is going on when it is a matter of importance affecting the community he represents, just as we have an obligation to tell the Major and the Postmaster and the heads of the Chambers of Commerce and the heads of the Aviation Committees, and so on and so forth.

We try to make it a practice of keeping congressmen informed of the important things going on in their communities

that they represent.

I expected that that chore would be done back in 1957 when we were seeking to get this matter set down for hearing, and I expected then that the contacts with congressmen, so far as whatever congressmen might do, would be left up to the communities.

* * * * *

JOINT APPENDIX - VOL. V

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15,414

UNITED AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 31 1962

Joseph W. Stewart
CLERK

NO. 15,415

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

PETITION FOR REVIEW OF ORDER OF THE
CIVIL AERONAUTICS BOARD

Pages 1231 through 1451
Containing Excerpts from Record Pages 8852 thru 10144

JOINT APPENDIX - VOL. V

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	Cross	6243	1104
	William J. McDonald		
	Direct	6248	1107
	Cross	6255	1112
	James P. Bowlin		
	Direct	6258	1114
	Cross	6268	1121
	Redirect	6272	1123

VOLUME IV (Cont'd.)

		Record Page	Joint Appendix Page
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	Direct	6277	1125
	Gordon B. Marsh		
	Direct	6297	1126
	Walter Barnhorst		
	Direct	6302	1127
Vol. VII	Morris Shipley		
	Direct	6344	1128
	Cross	6448	1135
Vol. VIII	Alfred R. Bone		
	Direct	6535	1137
	Cross	6601	1138
Vol. X	Thomas W. Barbour		
	Direct	6803	1141
	Cross	6942	1144
Vol. XII	Thomas Gray		
	Direct	7174	1146
	Albert Schlesinger		
	Direct	7213	1147
	Cross	7233	1147
	Charles C. Miller		
	Direct	7254	1148
	Francis McCarty		
	Direct	7263	1149
	Charles C. Miller		
	Direct (Resumed)	7273	1150
	Cross	7318	1153
Vol. XIII	Joseph W. Martin, Jr.		
	Direct	7375	1154
	Cross	7440	1199
	Redirect	7456	1210
	George Christopher		
	Direct	7462	1214
	Cross	7489	1217
Vol. XIV	Statement by Mr. Westwood	7541	1219
Vol. XV	Kenneth W. Brown		
	Direct	7682	1224
	Cross	7684	1225
	C. W. Jacob		
	Direct	7688	1225

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No. 1	8914	1233
No. 2	8915	1234
No. 3	8916	1235
No. 4	8918	1237
No. 5	8919	1238
No. 6	8920	1239
No. 7	8924	1242
No. 8	8925	1243
No. 9	8926	1244
No. 10	8927	1245
No. 11	8934	1249
No. 12	8935	1250
No. 13	8936	1251
No. 14	8937	1252
No. 15	8938	1253
No. 16	8940	1255
No. 17	8941	1256
No. 18	8942	1257
No. 21	8968	1258
No. 22	8977	1259
No. 23	8978	1260
No. 24	8980	1261
No. 25	8981	1262
No. 26	8984	1265
No. 27	8985	1266
No. 28	8986	1267
No. 29-1	8987	1268
No. 29-2	8988	1269
No. 29-3	8989	1270
No. 30	8990	1271
No. 31	8992	1272
No. 32	8993	1273
No. 33	8994	1275
No. 34	8995	1276
No. 35	8996	1277
No. 36	8997	1278
No. 37	9000	1281
No. 38	9001	1282
No. 39	9002	1283
No. 40	9005	1286
No. 41	9007	1288
No. 42	9008	1289
No. 43	9009	1290
No. 44	9010	1291
No. 45	9011	1292
No. 46	9012	1293
No. 47	9013	1294
No. 48	9017	1298
No. 49	9019	1300
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Exhibits:

	Record Page	Joint Appendix Page
Bureau of Enforcement (in part) (Cont'd.)		
No. 53	9023	1303
No. 55	9026	1306
No. 56	9029	1308
No. 57	9031	1309
No. 58	9034	1312
No. 59	9037	1314
No. 60	9062	1334
No. 61	9069	1341
No. 62	9072	1344
No. 63	9075	1347
No. 64	9076	1348
No. 65-1	9077	1349
No. 65-2	9078	1350
No. 66	9079	1351
No. 67	9080	1352
No. 68	9081	1353
No. 69	9082	1354
No. 70	9087	1359
No. 71	9088	1360
No. 72	9090	1362
No. 73-1	9097	1369
No. 73-2	9098	1370
No. 74-1	9099	1371
No. 74-2	9100	1372
No. 75	9101	1373
No. 76	9102	1374
No. 77	9103	1375
No. 78	9104	1376
No. 79-1	9105	1377
No. 79-2	9106	1378
No. 80	9107	1379
No. 81-1	9108	1380
No. 81-2	9109	1381
No. 82	9110	1382
No. 83-1	9111	1383
No. 83-2	9112	1384
No. 84	9113	1385
No. 85	9114	1386
No. 86	9119	1390
No. 87	9120	1391
No. 88	9121	1392
No. 89	9122	1393
No. 90	9123	1394
No. 91	9124	1395
No. 92	9125	1397
No. 93	9129	1401
No. 94	9131	1403
No. 95	9132	1404
No. 96	9138	1411
No. 97	9145	1418
No. 99	9164	1437
No. 100	9165	1438
No. 101	9166	1439
No. 103	9170	1440
TWA:		
No. R-1	9219	1442

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	Record Page	Joint Appendix Page
Brief for the United States, Amicus Curiae, Before the Civil Aeronautics Board, Docket No. 9214, et al., dated April 18, 1961	10075	1443
Brief of Enforcement Attorney to the Board, dated April 18, 1961 [Excerpts]	10103	1448
Order - United States Court of Appeals for the District of Columbia Circuit, Appeals Nos. 15,414 and 15,415, -- Filed April 2, 1962		1450

C.A.B.
Docket No. 9214

Exhibit No. AA-R1

Two hundred and fifty (250) copies of American's motion to sever and expedite were printed by Graham and Associates, Washington, D.C.

There are now still available approximately 20 copies in the offices of American and of American's counsel.

A substantial number,but it is not known how many, were destroyed some time ago in the course of making filing room for more current materials.

Routinely 55 copies of American's CAB pleadings are distributed to company personnel within American. Frequently this distribution to company personnel exceeds this number in a case of unusual interest to American personnel.

In this instance, because of the lapse of time, we have been unable to ascertain the number of copies distributed to American's personnel.

August 3, 1960

EXHIBIT NO. BOE-1

November 13, 1958

A. A. Paradis:

I suggest that you consider the following for your agenda for Monday.

1. Community Affairs work to build groundwork for publicity in San Francisco upon release of the Examiner's decision, New York-San Francisco, Nonstop. This should come out around December 10th. Full impact of the publicity should go to the CAB and pertinent legislators through proper channels.

2. Application by U. S. Overseas for exemption to fly New York-Los Angeles from December 17 to January 17. I just don't know what is being done, and I think Nelson and Jake might want to review our position for the benefit of others, since this is one of the important developments of the 10-flight grant.

3. Baltimore Adequacy hearing. This took place last week, Jerry Levenberg arguing it. I believe Nelson sat in on part of it and think that if you suggested it to him early enough he will be in a position to brief others on reactions to the hearing and estimates as to results. This could be important, because Jerry Levenberg and I agree that we will be extremely fortunate to come out as well as we did in the Fort Worth Adequacy Case.

4. Legislative Oversight Committee hearings. I will try to touch base with Morris on this so that he can review for the group the prospects in the immediate future.

5. I have been so far out of the picture that I am not sure I am right about this, but I have the impression that our original application for the San Antonio exemption was based on incorrect and inadequate analysis of aircraft availability. If so, I should think that somebody ought to find out what we can do to prevent this happening again, because I think it came close to putting the company in an embarrassing light at the CAB. I am sure, however, you would want to discuss with Mr. Jacob whether this is appropriate for discussion with the luncheon group.

I hope to dictate for Jake a status report on many more matters before I get away, and it is possible that he will want to touch on some of them in addition to the above 5.

Dwight D. Taylor

EXHIBIT No. BOE-2

TRAVELING EXPENSE STATEMENT

To 5/11 19_7

Purpose of Trip: Washington – New York (Congressional trip)

NAME

EMPLOYEE No.

POSITION

BASE STATION

DEPT. AND

Check one

DESCRIPTION	SUNDAY DATE	MONDAY DATE 5/6	TUESDAY DATE 5/7	WEDNESDAY DATE 5/8	THURSDAY DATE 5/9	FRIDAY DATE 5/10	SATURDAY DATE 5/11	TOTAL
BREAKFAST						70	1 85	2 55
LUNCHEON		(2) 5 15	6 82	(2) 12 25	5 00	8 09		37 31
DINNER				(2) 32 50		6 73		39 20
HOTEL (ATTACH RECEIPTS)								
TEL & TEL (EXPLAIN)*		20		30			30	80
TAXI (EXPLAIN)*		1 70	2 00	2 50	2 10	4 20	5 75	18 15
AUTO EXPENSE — GENERAL TRAVEL MILES ____ @ ____ ¢	( )	( )	( )	( )	( )	( )	( )	
AUTO EXPENSE — TRANSFER MILES ____ @ ____ ¢	( )	( )	( )	( )	( )	( )	( )	( )
TRANSPORTATION OTHER THAN TAXI*								
LAUNDRY, VALET (ATTH. RCPTS.)								
Misc.			5 60	17 60	8 00	3 15	2 00	36 35
TOTAL EXPENSE		7 05	14 42	65 15	15 10	22 74	9 90	134 36
LESS ALLOWANCE FOR GOING ROUTE AND TRIP (FLGT. CREDIT)								
STATION OR TYPE OF EQUIP. FLOWN								
CODE NUMBER, ETC.								

TRIP EXPLANATION		STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME
GOING	DEPART														
	ARRIVE														
RETURNING	DUE TO DEPART														
	ACTUAL DEPARTURE														
	ARRIVE														

*EXPLANATION OF ACTIVITIES OR EXPENDITURES

SUN.

MON.

TUES.

WED.

THUR.

FRI.

SAT.

TOTAL EXPENSE	134	36
LESS ADVANCE DATE: STATION		
BALANCE DUE — EMPLOYEE	134	36
BALANCE DUE — COMPANY		
BALANCE REMITTED	☐	

FOR TREASURY USE ONLY

TOTAL EXPENSES	$
LESS ADVANCES	$
ISSUE CHECK FOR	$

☐ MAIL CHECK TO ____

☐ CREDIT EXPENSE ADVANCE ACCOUNT

SIGNATURE OF EMPLOYEE

SIGNATURE OF APPROVAL

AUDITED

EXHIBIT No. BOE 3
p1

TRAVELING EXPENSE STATEMENT

FROM 7/27 19[illegible] TO 8/2 19[illegible]
PURPOSE OF TRIP:
TRIP AUTHORIZED BY:

NAME
EMPLOYEE NO.
POSITION
BASE STATION [illegible]ingt
DEPT. AND/OR DIV.
CHECK ONE

DESCRIPTION	SUNDAY DATE 7/27	MONDAY DATE 7/28	TUESDAY DATE 7/29	WEDNESDAY DATE 7/30	THURSDAY DATE 7/31	FRIDAY DATE 8/1	SATURDAY DATE 8/2	TOTAL
BREAKFAST				1 65			1 70	[illegible]
LUNCHEON	11 06	24 84	5 39	6 58	(2) 6 20	2 25	1 90	[illegible]
DINNER	3 60	4 70	(3) 21 00		(3) 24 00	3 85	3 40	[illegible]
HOTEL (ATTACH RECEIPTS)			11 00	18 00	18 00	18 00	18 00	[illegible]
TEL & TEL (EXPLAIN)*			5 94	41	1 64	2 85	84	[illegible]
TAXI (EXPLAIN)*	LGA 7 90	LGA 8 65	6 40	4 10	[illegible] 30	4 50	4 15	[illegible]
AUTO EXPENSE GENERAL TRAVEL MILES @	( )	( )	( )	( )	( )	( )	( )	( )
AUTO EXPENSE TRANSFER MILES @	( )	( )	( )	( )	( )	( )	( )	( )
TRANSPORTATION OTHER THAN TAXI*			32 34					32 34
LAUNDRY, VALET (ATTH. RCPTS.)								
Misc.	4 20	5 75	6 00	1 50	45 00	46 10	4 00	112 55
TOTAL EXPENSE	26 76	43 94	88 07	32 34	101 14	77 55	33 99	403 79
LESS ALLOWANCE FOR GOING ROUTE AND TRIP (FLGT. CREWS)	Four hundred three dollars and seventy-nine cents							
STATION OR TYPE OF EQUIP. FLOWN								
CODE NUMBER, ETC.								

TRIP EXPLANATION		STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME
GOING	DEPART	DCA	6:10pm			DCA	5:30pm	YIP	10:25am						
	ARRIVE	LGA	7:20pm			YIP	6:30pm	CHI	11:30am						
RETURNING	DUE TO DEPART			EWR	9:45pm			CHI	12:35pm						
	ACTUAL DEPARTURE			EWR	9:45pm			CHI	12:35pm						
	ARRIVE			DCA	10:55pm			SFO	5:10pm						

*EXPLANATION OF ACTIVITIES OR EXPENDITURES

SUN.27 - Washington-New York
MON.28 - New York-Washington
TUES.29 - Washington-Detroit
WED.30 - Detroit-Chicago-San Francisco
THUR.31 - San Francisco
FRI.1 - San Francisco
SAT.2 - San Francisco

TOTAL EXPENSE		
LESS ADVANCE DATE: STATION:		
BALANCE DUE	EMPLOYEE	
	COMPANY	
BALANCE REMITTED		☐

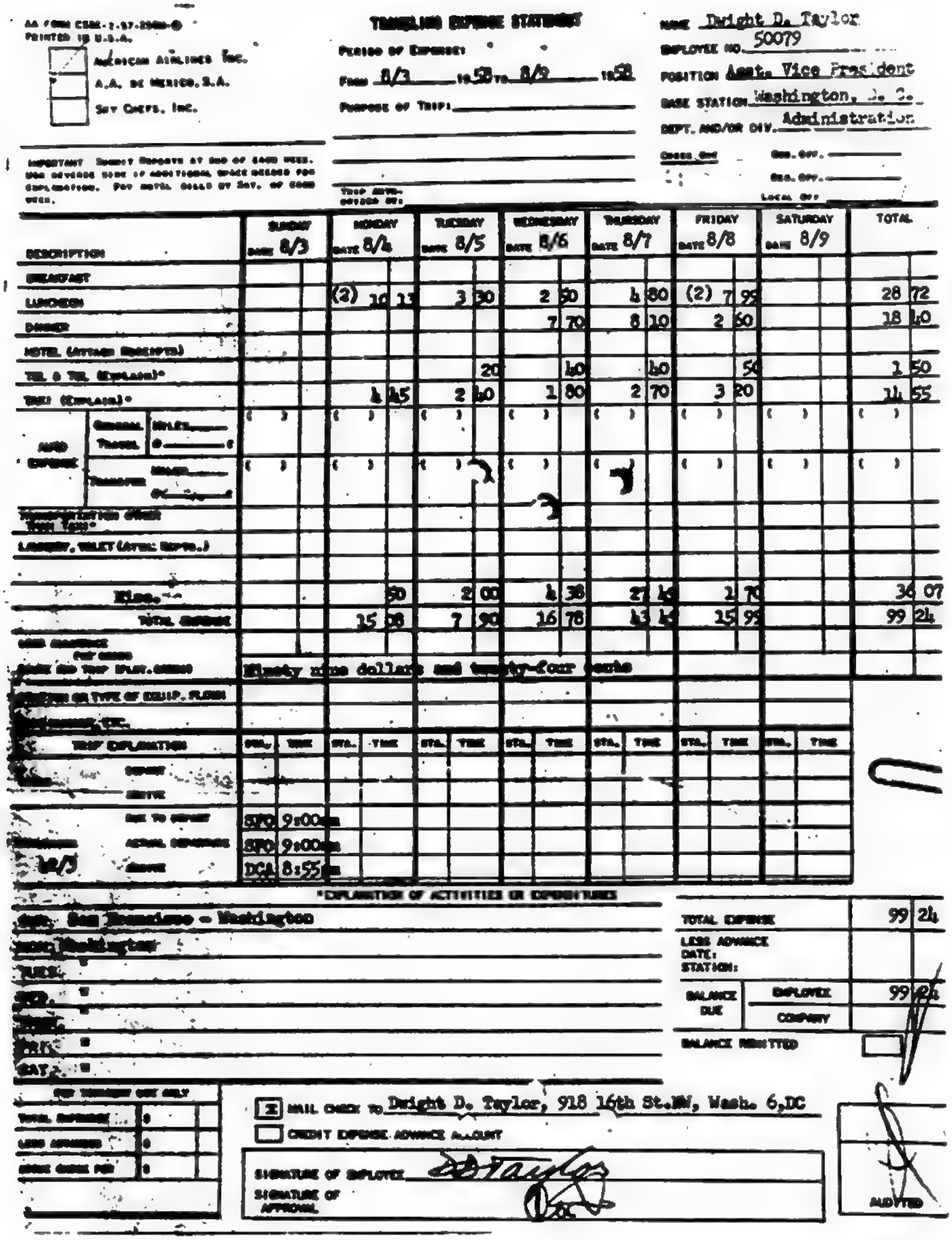
FOR TREASURY USE ONLY	
TOTAL EXPENSES	$
LESS ADVANCES	$
ISSUE CHECK FOR	$

☒ MAIL CHECK TO Dwight D. Taylor, 918 16th St., NW, Wash. 6, DC
☐ CREDIT EXPENSE ADVANCE ACCOUNT

SIGNATURE OF EMPLOYEE D D Taylor
SIGNATURE OF APPROVAL

AUDITED

EXHIBIT No. BOE 3
p 2



AA FORM CSBE-2-57-2500-Ⓑ
PRINTED IN U.S.A.

☒ AMERICAN AIRLINES Inc.
☐ A.A. DE MEXICO, S.A.
☐ SKY CHEFS, INC.

TRAVELING EXPENSE STATEMENT

PERIOD OF EXPENSE:
FROM 8/3 19 58 TO 8/9 19 58
PURPOSE OF TRIP:

TRIP AUTHORIZED BY:

NAME Dwight D. Taylor
EMPLOYEE NO. 50079
POSITION Asst. Vice President
BASE STATION Washington, D. C.
DEPT. AND/OR DIV. Administration

IMPORTANT Submit reports at end of each week. Use reverse side if additional space needed for explanation. Pay hotel bills by Sat. of each week.

DESCRIPTION	SUNDAY DATE 8/3	MONDAY DATE 8/4	TUESDAY DATE 8/5	WEDNESDAY DATE 8/6	THURSDAY DATE 8/7	FRIDAY DATE 8/8	SATURDAY DATE 8/9	TOTAL
BREAKFAST								
LUNCHEON		(2) 10 13	3 30	2 50	4 80	(2) 7 99		28 72
DINNER				7 70	8 10	2 60		18 40
HOTEL (ATTACH RECEIPTS)								
TEL & TEL (EXPLAIN)*			20	40	40	50		1 50
TAXI (EXPLAIN)*		4 45	2 40	1 80	2 70	3 20		14 55
AUTO EXPENSE — PERSONAL MILES ___ @ ___ ¢	( )	( )	( )	( )	( )	( )	( )	( )
AUTO EXPENSE — COMPANY MILES ___ @ ___ ¢	( )	( )	( )	( )	( )	( )	( )	( )
TRANSPORTATION OTHER THAN (AA)*								
LAUNDRY, VALET (ATTACH RECPTS.)								
Misc.**		50	2 00	4 38	27 16	1 70		36 07
TOTAL EXPENSE		15 08	7 90	16 78	43 16	15 99		99 24
[illegible]								
[illegible]	Ninety nine dollars and twenty-four cents							
[illegible] OR TYPE OF EQUIP. FLOWN								
[illegible]								

TRIP EXPLANATION	STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME	STA.	TIME
DEPART														
ARRIVE														
SCH. TO DEPART	SFO	9:00am												
ACTUAL DEPARTURE	SFO	9:00am												
ARRIVE	DCA	8:55pm												

8/3

*EXPLANATION OF ACTIVITIES OR EXPENDITURES

Sun. San Francisco – Washington
Mon. Washington
TUES.
WED.
THURS.
FRI.
SAT.

TOTAL EXPENSE		99 24
LESS ADVANCE DATE: STATION:		
BALANCE DUE	EMPLOYEE	99 24
	COMPANY	
BALANCE REMITTED		☐

FOR TREASURY USE ONLY

TOTAL EXPENSE	$
LESS ADVANCE	$
ISSUE CHECK FOR	$

☒ MAIL CHECK TO Dwight D. Taylor, 918 16th St.NW, Wash. 6,DC
☐ CREDIT EXPENSE ADVANCE ACCOUNT

SIGNATURE OF EMPLOYEE DDTaylor
SIGNATURE OF APPROVAL

AUDITED

[8918]

EXHIBIT NO. BOE-4

August 12, 1959

Mr. C. W. Jacob - NYC

Assistant Vice President - DCA

During at least the next year, Charlie Strickler will be making frequent trips to Miami and New Orleans in connection with the Southern Transcontinental Case. If the frequency of these trips even approximates the frequency of trips he made to San Francisco, the outlay of cash charged to his expense reports will be considerable.

During 1958, Charlie made 16 round trips to San Francisco. Sixteen round trips to New Orleans would amount to $2,337.76 including tax; 16 round trips to Miami would be $2,353.12. Of course many times he would cover both cites on one trip at a cost of approximately $201.58 including tax, and I'm sure he would not be making 16 separate trips to each city.

In order to avoid such outlay of cash, would it not be desirable to secure an ATP card for him?

Dwight D. Taylor

[8919]

EXHIBIT NO. BOE-5

July 1, 1958

Mr. Charles C. Miller
Manager, Transportation Department
San Francisco Chamber of Commerce
333 Pine Street
San Francisco 4, California

Dear Charlie:

The attached will complete your record of the interviews. Also attached are the comments which can be worked into the testimony of Leon Gregory for the Flower Shippers. I hope that some of the companies submit the information requests this week so that the following week we can begin to get some idea as to who our witnesses are going to be and what they will be able to say. It is important to get this information also, so that we can determine how many more prospective witnesses we should interview. At the present time one remaining important interview is with the San Francisco Convention and Tourist Bureau, other than following up. We also want to interview the Redwood Travel Agency, since they have indicated a strong desire to help. Other than those two, are there others that you feel strongly should be interviewed.

I plan to be in San Francisco July 8, for the rest of that week and I am looking forward to seeing you then. If you have any questions, in the meantime, please do not hesitate to call.

Sincerely,

Charles L. Strickler
Assistant to Vice President

CLS:bo

Attachment

[8920]

EXHIBIT NO. BOE-6

February 15, 1957

Ed Rhatigan:

Here are some thoughts I have passed on to Charlie, re. New York-San Francisco.

This of course is not the full story as we would present it to the Board, but it is merely intended to clear the main points that might be persuasive with the city.

Mel Brenner

E. K. RHATIGAN
FEB 15 1957

f San Francisco

[8921]

CONFIDENTIAL

Mr. Charles L. Strickler - DCA

February 14, 1957

Manager of Route Development - NYCP

New York-San Francisco

In accordance with our conversation, I am indicating below some thoughts as to reasons why San Francisco should favor American for New York-San Francisco nonstop.

1. Our Record of Transcontinental Leadership Shows We Could Best Provide Needed Service Improvement In This Market

A. American provided first New York-Los Angeles nonstop round trip service (November 1953). United followed 7 months later (June 1954) and TWA 8 months later (July 1954). American now provides more nonstop flights in that market (10 daily one way flights, February 1957) than its two competitors combined (4 for UAL; 5 for TWA).

B. The nonstop service New York-Los Angeles—inaugurated by American— preceded by 1 1/2 years the first nonstop round trip service provided New York-San Francisco (June 1955).

C. Even with our limitations on San Francisco authority, American provided first DC-7 service New York-San Francisco, which was the fastest in the market at that time (February 1954). United followed 4 months later.

D. American provided first, and still provides only, nonstop DC-7 coach New York-Los Angeles. The attractiveness of this service to the public is indicated by the fact that by September 1956 (first survey period after its inauguration) our coach traffic in that market had increased 60% over preceding September, while TWA declined slightly, and United declined by 39%.

E. Of the three combination carriers, American provided the first, and still provides the only, express (1 stop) New York-Los Angeles all cargo service. More generally, American's overall leadership in cargo is well recognized.

F. The general effects of American's leadership is evident in the comparative service provided New York-Los Angeles vs. New York-San Francisco. Traffic in the former market is 47% more than in the latter, but it receives nearly 4 times as many daily nonstops (19 for New York-Los Angeles vs. 5 for New York-San Francisco). In New York-Los Angeles market, American alone provides twice as many nonstop flights as TWA and United combined provide between New York and San Francisco.

[8922]

2. Route Structure Considerations Mean That Only American Could Provide Really Effective Competition For The Two Existing Nonstop Carriers

A. We would of course be the only applicant with existing routes into both New York and San Francisco. Thus, for any other applicant, this route would mean an isolated terminal, remote from its existing operations. At best, this poses problems, even where a carrier serves such a terminal mainly on non-competitive routings. In this specific case, however, the problems would be especially serious, since the new carrier would be trying to break into a market already served by two of the largest carriers in the industry, both of whom have a variety of routings from both terminals. This would mean, among other things that any other applicant would have far less flexibility in the competitive timing of its schedules. Its timing would be governed by the necessity of turning the equipment on itself, whereas TWA and United (or American) would have the flexibility to also turn equipment from other routings.

Furthermore, this "isolated terminal" aspect would make it more difficult for any other applicant to maintain schedule reliability. Unless it maintained an idle aircraft constantly at this terminal (and with jets that would mean the commitment of $5 million for the single purpose of assuring reliability on this one route), it would have no way to "protect" departures from this terminal in the event of either: (a) a mechanical breakdown at this terminal; or (b) a weather cancellation of a departure from the other terminal.

The practical significance of the "isolated terminal" problem can be highlighted by Capital's experience in Atlanta and New Orleans. So long as they were separate terminals, Capital did practically nothing in the New York-Atlanta and New York-New Orleans markets in competition with Eastern's integrated route. (Also note United and Trans World's long-repeated arguments about their formerly separated East Coast terminals, even though those terminals were less isolated from the rest of their route systems than would be the case here if some other applicant obtained New York-San Francisco nonstop.)

From the city's standpoint, the above factors would limit the quality of the service, and the effectiveness of the competition San Francisco might expect from any other applicant.

B. As a related factor, from a sales standpoint, any other applicant would have difficulty in establishing "market identification" at its new terminal, since its only exposure to the public would be on the few nonstops it could offer in this one market. This again would limit its competitive effectiveness, and hence limit what it could do for San Francisco.

[8923]

C. Not only would American's route structure give it a continuing advantage over any other applicant, but the fact that we have established facilities, operations, "market identification", etc., at both terminals would enable us to start effective competitive service more rapidly than could any other carrier. This would be especially true as compared with any of the possible "small carrier" applicants, with respect to which the Board itself has repeatedly recognized the difficulty and time required to break into markets already served by Big Four carriers.

3. According To The Standards The C.A.B. Would Normally Use, American Would Be The ONLY Logical Choice For This Route.

American would be seeking only the elimination of a compulsory stop in a market where it already operates through plane service, and has had historical traffic participation. Any other applicant would require a major route extension into an area outside its existing route pattern, in order to serve a market where it has had no past participation.

MB:SB

Mel Brenner

[8924]

EXHIBIT NO. BOE-7

July 8, 1957

Mr. Joseph Martin, Jr.
President
Public Utilities Commission
400 Montgomery Street
San Francisco, California

Dear Joe:

The attached list includes the people to whom you wrote in connection with the San Francisco - New York nonstop issue. There may be others, but the attached list is all that we are aware of.

Also enclosed with this letter is a list of people to whom Mayor Christopher wrote in regard to this matter. I think you will agree that a copy of the Mayor's letter of July 3, 1957, should be sent to them as well.

I hope to be in San Francisco the week of July 15. Perhaps we can have lunch. If there is anything further we can do from this end before that time, please let us know.

Best personal regards.

Sincerely yours,

Charles L. Strickler
Assistant to Vice President

CLS:bv

Attach.

EXHIBIT NO. BOE-8

May 10, 1957

DOWNTOWN ASSOCIATION LIST

Karl M. Stull
Retail Dry Goods Asstn.
15 Stockton St.

Harold V. Starr
Retail Merchants Asstn.
Chamber of Commerce
333 Pine St.

Elmer G. Johnson
Bldg. Owners & Mfrs. Asstn.
68 Post St.

Daniel W. Klein
S. F. Real Estate Board
105 Montgomery St.

Margaret S. Field
Apt. House Asstn. of S.F.
760 Market St.

Florence Gardner
S. F. Advertising Club
690 Market

Walter Swanson
S. F. Convention & Visitors Bureau
Civic Auditorium
Grove St.

Martin Pray
S. F. Jr. Chamber of Commerce
333 Pine

Harry Troupe
Calif. Northern Hotel Asstn.
15 Stockton St.

Raymond Crummey
S. F. Hotel Asstn.
370 Geary

Ruth Dupta
Central Council of Civic Clubs
2237 Chestnut

Joseph D. Sullivan
S. F. Hotel Employers Asstn.
760 Market St.

Phillips S. Davies
Northern Central Improvement Asstn.
235 Montgomery St.

Frank Foisie
S. F. Employers Council
114 Sansome

Frank Marsh
S. F. Bay Area Council
World Trade Center
Ferry Bldg.

Mrs. John Ryan
League of Women Voters
St. Francis Hotel

Jack Goldberger 11:00 a Mon
S. F. Labor Council 5/13
240 Golden Gate

Mary Jane Rolfe
S. F. Planning & Housing Asstn.
210 Post St.

Matthew J. Boxer
S. F. Council of Dist. Merchants
1401 Fillmore St.

Hulda McGinn
Calif. Theaters Asstn.
988 Market

Roy Haus - YU 6-0005
C.I.O. - Frank E. White, Sec'y
690 Market

Clarence DeLane
Golden Gate Restaurant Asstn.
291 Geary

Copies to:
C. W. Jacob - NYCP
✓M. Shipley - NYCP
A. R. Bone - LAXS
C. STRICKLER - DCAS

ASST. V'CE PRESIDENT

JUL 21 1958

STATE & COMMUNITY
AFFAIRS DEPARTMENT

14 Sec. I—S. F. Examiner Thursday, July 17, 1958 ★ C

Downtown Unit Backs 3rd Air Route to N.Y.

By RONALD JOHNSON.

Directors of the Down Town Association of San Francisco voted yesterday to support San Francisco's official request for a third nonstop airline service between the Bay area and New York.

The action was regarded as a victory for American Airlines, which has been trying for several years for permission to share the nonstop run with United Air Lines and Trans World Airlines, presently the only two carriers providing such service.

The vote, which was announced as unanimous, came just a week after the directors of the association, representing most downtown interests, met to take similar action and, for an unexplained reason, did nothing.

ISSUE TABLED.

The matter was tabled a week ago despite the fact that the Down Town Association previously had urged the Civil Aeronautics Board to expedite hearings on the request for additional service.

Yesterday's action came at the end of a two hour and 30 minute closed door session at the St. Francis Hotel, at which the board listened to representatives of American, Northwest Airlines, the City of San Francisco and the two lines fighting the application, TWA and United.

CAB HEARING.

The board, in addition to supporting the city's position, authorized the appearance of its attorney, Sylvester J. McAtee, at a CAB hearing here on July 30 to urge the granting of additional nonstop service.

McAtee will join many other representatives of civic organizations, labor groups, consulates and others to be presented as witnesses by the city.

American Airlines' argument for active support of the Down Town Association was presented by Charles Strickler of Washington, D. C., assistant to the president of the company.

Strickler pointed out that United and TWA were opposing his company's application, and that they had asked in the past for delays in scheduling CAB hearings.

JET SERVICE

He said that such delays already had made it impossible for his company to follow its original plan to give San Francisco jet passenger service in November of this year, at the same time it plans to initiate jet service between New York and Los Angeles. American now hopes to put its Boeing 707 jets into San Francisco-New York service next February. He told the board:

"United Air Lines and TWA or any other carrier must not be permitted to block the path of progress for San Francisco—progress that must be experienced if San Francisco is to achieve its rightful status in the national air transportation economy.

"There can be no mistake about the importance of this route case to San Francisco, as evidenced by the unstinting, united and unparalleled efforts put forth by your city government, Chamber of Commerce, newspapers, groups in Oakland and this very association in seeking an expedited hearing on the need for an additional nonstop carrier.

"Failure of the Down Town Association to maintain a solid front could place in jeopardy the objective fought for so vigorously for so long by so many," Strickler said.

?

EXHIBIT No. BOE 9

[8927]

EXHIBIT NO. BOE 10

FROM: AMERICAN AIRLINES
Tom Barbour - Public Relations
1420 Russ Building
San Francisco, California
YUkon 2-4620

FOR YOUR INFORMATION:

REMARKS OF MR. CHARLES L. STRICKLER, ASSISTANT TO THE VICE PRESIDENT, WASHINGTON AFFAIRS, AMERICAN AIRLINES

BEFORE THE BOARD OF DIRECTORS OF THE DOWN TOWN ASSOCIATION OF SAN FRANCISCO

JULY 16, 1958

SAN FRANCISCO-NEW YORK NONSTOP CASE

[8928]

United and TWA, or any other carrier, must not be permitted to block the path of progress for San Francisco.

Progress must be experienced if San Francisco is to achieve and enjoy its rightful status in the air transportation economy. There can be no mistake about the importance of this route case to the City of San Francisco as evidenced by the untiring united and unparalleled efforts put forth by your city, government, the Chamber of Commerce, the newspapers, the groups in Oakland and this very association in seeking an expedited hearing on the need for an additional San Francisco-New York nonstop air carrier.

Your efforts bore fruit. The Civil Aeronautics Board, acting on your proceeding, ordered the staff to make a study of the San Francisco-New York route structure and service. After extensive review, the Board concurred in your concern

[8929]

and ordered the matter set down for expeditious handling. You are on the brink of success. The hearing is scheduled to commence in San Francisco on July 30. The importance of your continued support cannot be exaggerated. The failure of the Down Town Association to maintain a solid front could very well place in jeopardy the objective fought for so vigorously and for so long by so many in this community.

The decision before you today should not be the debatable point of whether United and TWA will be injured by another San Francisco-New York nonstop carrier but whether you are going to continue to fight for what you and the others just mentioned. Additional service was needed and required in the best interests of the six million people who use the San Francisco International Airport and for which you have been fighting since before 1953.

Your decision would affect not only the people in the Bay Area but rather it affects people in an area from Fresno in the south, to Medford, Oregon in the north, and Reno, Nevada in the east. The people in the outlying areas have no one to formally represent them before the Board. They must rely on you to represent them.

[8930]

If San Francisco does not win in this case, it will be many years before another opportunity is afforded to acquire a much needed 3rd San Francisco-New York nonstop air carrier.

What makes this case so important to San Francisco? It is impossible to review all of the facts and details, but a few of the high points may be helpful. First, let's look at the importance of the San Francisco-New York market. This market has consistently been the No. 2 or No. 3 revenue producing market in the nation. It is San Francisco's most important long-haul market. It is the No. 1 market in the country with only two nonstop carriers. What these statements mean is that this market is sufficiently strong to support three carriers and it also proves that this is the most logical market where a third carrier should be added.

Next, let's see how the San Francisco-New York route structure compares with other markets around the country. First, every major city on both the east and west coasts has three nonstop carriers in its largest transcontinental market except San Francisco despite the fact that the San Francisco-New York market has more traffic to support three carriers than all of those markets, except Los Angeles-New York, put together.

[8931]

Second, among the country's leading air markets alone, there are 38 that are smaller than San Francisco-New York, yet each of those have at least three nonstop carriers - many have more.

This means that winning this case will not put San Francisco-New York ahead in the nation's air commerce, but will merely bring San Francisco even with, or just bring it a little closer to the route patterns already enjoyed by those many smaller air markets.

This means also that those many less important air markets already have available a superior air route structure to satisfy the revolutionary jet era. The superior route pattern enjoyed by other markets results in large part from the aggressive and forceful presentations made by those cities before the CAB.

In view of these facts, we believe you will agree that the San Francisco-New York route structure is grossly inferior and must be modernized to meet the requirements and demands that will result from the new business stimulated by jet operations.

San Francisco must move ahead — failure to do so means you move backwards. There is no status quo in a progressive economy.

[8932]

Next, let's see how San Francisco has compared to Los Angeles in service to New York. In every major new air service introduced, San Francisco lagged substantially behind Los Angeles. San Francisco lagged behind Los Angeles in receiving express DC-4 transcontinental service. San Francisco lagged behind Los Angeles in receiving express DC-6 or Constellation coach service. San Francisco lagged behind Los Angeles in receiving first transcontinental nonstop service. San Francisco lagged behind Los Angeles in receiving coach nonstop service. San Francisco lagged behind Los Angeles in receiving exclusive all-cargo service to New York.

But even of more concern to San Francisco is the knowledge that it will lag behind Los Angeles in receiving jet service. Jet service is only a few months away. Los Angeles will receive it in November of this year. The reason why San Francisco has lagged and will continue to lag is due to the lack of competitive spur provided by the third nonstop carrier, as is the case in the Los Angeles-New York market. Next, let's see how San Francisco compares with Los Angeles in terms of actual service to New York. The best yardstick for such a comparison is seats available for the passengers. In March 1957, the last CAB survey period before motions were filed for an expedited hearing on the need for an additional nonstop carrier

[8933]

between San Francisco and New York, that market received only 51.1 nonstop seats for every 100 passengers, whereas the Los Angeles-New York market received 136 nonstop seats for every 100 passengers. This means that half of the San Francisco-New York passengers could not get on the nonstop services and were forced to resort to inferior services such as one or two-stop flights, whereas the Los Angeles-New York passengers had an abundance of nonstop seats available.

Looking ahead to jet operations, unless a third nonstop carrier with jet equipment is certificated between San Francisco and New York, inadequate service, which caused San Francisco with your support to press for an additional carrier, will once again be present. Whereas in 1959, Los Angeles-New York will be receiving jet nonstop service by two carriers, San Francisco-New York will have jet nonstop service by only a single carrier, TWA, and that carrier, as shown by their own exhibits, cannot provide sufficient capacity to carry the traffic in this market. Once again, San Francisco-New York passengers will be compelled to use inferior services.

[8934]

EXHIBIT NO. BOE-11
July 9, 1957

Mr. James J. Sullivan
Board of Supervisors
City and County of San Francisco
31 West Portal Avenue
San Francisco, California

Dear Mr. Sullivan:

It was a pleasure meeting you in Mayor Christopher's office last week, although our visit was very short. I apologize for not having one of my cards at the time, but one is enclosed.

We appreciate the support of the Board of Supervisors to the resolution adopted by the Public Utilities Commission seeking a hearing on the need for an additional San Francisco - New York nonstop air carrier. Needless to say, being an air carrier without such nonstop authority, American Airlines is extremely interested in an affirmative conclusion to that issue and will continue to work with the city toward that end. The city of San Francisco and, in fact, practically all of northern California has done a magnificent job in putting their case before the Civil Aeronautics Board in Washington.

Hoping to have the pleasure of visiting with you again in San Francisco, I remain,

Yours truly,

Charles L. Strickler
Assistant to Vice President

CLS:bv
Encl.

[8935]

EXHIBIT NO. BOE-12

July 1, 1958

Mr. Frank J. Needles
Deputy City Attorney
City Hall
San Francisco 2, California

Dear Frank:

Attached are the summaries of the last few interviews. The important ones remaining are the San Francisco Convention and Tourist Bureau and the Redwood Travel Agency. I will visit the Redwood Travel Agency with you next week. Are there others you think should be interviewed before we receive the information requests and get some idea as to how many witnesses we will have.

I plan to be in San Francisco July 8, and if you have any questions in the meantime, please give me a call. I trust that Nels Miliken took you to see the three travel agencies we discussed last Friday.

Sincerely,

Charles L. Strickler
Assistant to Vice President

CLS:bo

Attachment

[8936] Jacob

EXHIBIT NO. BOE-13

Interoffice Correspondence

AMERICAN AIRLINES
Confidential

Date July 9, 1958 SFO try

To C. W. Jacob - NYCP
Morris Shipley - NYCP

Attention ASST. VICE PRESIDENT

Reference JUL 10 1958

STATE & COMMUNITY AFFAIRS DEPARTMENT

From Assistant to Vice President - DCAS

Subject San Francisco-New York Nonstop Case

Our case on "Need" is not as strong as it should be. We are having some trouble in demonstrating inadequacy of service. Thus far, we have not been able to find the "fighting" type witnesses as we did in St. Louis. We have interviewed some thirty-five to forty prospective user witnesses and almost everyone of these made it perfectly clear that they would not speak out against United. The great majority is in favor of an additional nonstop carrier in the San Francisco-New York market, but United has apparently done an extremely good job with the big users and they appear to feel that their needs have been satisfied. There has been some minor concern experienced over TWA, but nothing to really build on.

We have found that United, in particular, has arrangements with the big users whereby a special service representative is assigned to each user, and whenever the user desires space he contacts his particular service rep. This results in priority and special treatment. We have learned that United maintains separate wait lists, one for their big accounts, another for the people on the street. Whenever space becomes available through cancellation, it is first offered to the big users on the separate wait list, and when the list is exhausted, the space is then offered to the "man on the street" on the wait list. As a result of such preferential treatment, the big users have, for the most part, been able to ultimately get space on the nonstop flights even though they had to be wait-listed. We feel that these special arrangements and priority treatment must be revealed on the record in this case. We must convince the Examiner and the Bureau that the experiences of the big users are not typical of the experiences of the "man on the street." This raises the question of our own policy in this regard and of whether we run unjustifiable risk by exposing the practices of United. In this regard, I seek your counsel. ND

There is another point on which I seek your advice. In San Francisco, as perhaps in other cities, American, TWA and United exchange comparative statistics. Up until the San Francisco-New York nonstop issue became active, United and TWA were giving us the load factors on their nonstop services. We are still today getting the load factors on some of their nonstop San Francisco-New York flights. I have talked with people here in San Francisco about using this data in our exhibits or testimony 7 and they are not concerned over our revealing the source of this information. We are not, at this point, certain whether we will use this information, but since revealing the data will affect the exchange of similar data in other cities, we would like your "okay" before the San Francisco information is used.

/s/ Charlie
Charles L. Strickler

CLS:lh

[8937]

EXHIBIT NO. BOE-14

May 1, 1957

C. H. Startup/T. W. Barbour - SFOS

Assistant to Vice President - DCA

You probably have already done so but if not may we suggest that, in connection with the press, civic and public relations program we discussed last week, thought be given to the preparation of a complete list of associations, groups, chambers of commerce, newspapers and other publications in San Francisco/Oakland and the surrounding cities and counties that we should call on.

It would also save time if we knew in advance the person or persons to see in the places of contact. If this can be done we should be in a better position when we sit down next Wednesday to block out our program and make specific assignments to the members of our group.

See you next Tuesday.

/s/ C.L.S.
Charles L. Strickler

CLS:dm
cc: A. R. Bone, Jr.
Burck H. Smith
Morris Shipley

[8938]

EXHIBIT BOE-15

CONTACT LIST
- NONSTOP -

DOWN TOWN SAN FRANCISCO

SHELL OIL COMPANY 100 Bush EX 2-5400
Dave Marshall - Special Services Rep. (Controls Traffic)
Bob Adamson - Mgr. Aviation Gas Sales
Fred Ellsworth - " " " "
(Contact Marshall)

BECHTEL CORPORATION 220 Montgomery DO 2-4032
June Heskner - Traffic Dept. She reports to:
J. F. O'Connell - VP Industrial Rel. (Adviser)
She influenced by UAL; good records
(720 trips to NY last year)

MORRISON KNUDSEN 120 Montgomery EX 2-8965
ATP - TWA...Close to TWA due overseas
Al H. Kincaid - Traffic Manager
(1100 one-way to NY)

ERNEST HODGES (Buss Hodges) 130 Kearny YU 2-6040
GUILD BASCOM & BONFIGLI
Admiral - will testify

CROWN ZELLERBACH 343 Sansome YU 6-0822
G. J. Ticoulat - Ex. VP
(Admiral)
(Heavy to NY)

P G & E 245 Market SU 1-4211
M. H. Costes - Traffic Manager
Legal & Top Management - Robert Gardes
(Friend N. L. Smith)

TIDEWATER OIL 604 Mission EX 2-4800
J. M. Connors - Traffic Manager
Don Decious- Clerk

CALIFORNIA PACKING CORPORATION 215 Fremont SU 1-7760
P. S. Labagh - (Pers. friend Charles Miller)
Able - has testified before; a professional -
must be sold on this case.

[8939]

(Contact List - Down Town San Francisco)

I. MAGNIN CO. Hector Escabeca, Pres. Geo. Trapp - Gen. Mgr. Controls Traffic (Buyers go same time to N.Y. - cause prob.)	Geary & Stockton	DO 2-2100
MACY'S Mrs. Harriet Adams - Traffic Mgr. (Freight user also)	O'Farrell & Geary	SU 1-1800
BEN SWIG Swig & Weiler - 16 trips to NY - AAL	Fairmont Hotel	DO 2-8800
FIBREBOARD PRODUCTS R. A. Marin - Director of Traffic	1789 Montgomery	DO 2-6900

EXHIBIT NO. BOE-16

CONTACT LIST
- NONSTOP -

DOWN TOWN ASSOCIATION Al Schlesinger - Pres. Judge McAtee	57 Post Street	DO 2-7842
JOSEPH MAGNIN Cyril Magnin	Stockton & O'Farrell	YU 6-5757
BANK OF AMERICA Allan K. Brown	300 Montgomery	DO 2-6112
CROCKER ANGLO NATIONAL BANK Al Dorro	1 Montgomery	EX 2-7700
DEMOCRATIC CENTRAL COMMITTEE Roger Kent	212 Sutter	DO 2-7020
KORET OF CALIFORNIA Walter Reuben	611 Mission	EX 2-8723
ASSOCIATION OF NEIGHBORHOOD DISTRICTS Evelyn Laplace	870 Market	SU 1-4480
THE WINE INSTITUTE Mr. McCauley	717 Market	YU 6-0878
REPUBLICAN NATIONAL COMMITTEE Bob Steele	525 Market	YU 2-3948
LILLI ANN CORPORATION Adolph Schuman	2701 16th	UN 3-2720
S.F. CENTRAL LABOR COUNCIL George Johns, Exec. Secy.	2940 16th	MA 1-6304

[8941]

EXHIBIT NO. BOE-17

CONTACT LIST
- NONSTOP -
PENINSULA

GUY S. ATKINSON Miss Hudson	10 W. Orange Ave. (100 r.t.'s)	So. San Francisco	PL 6-0300
EITEL McCULLOUGH John Stinson - Mgr. of Procurement (22 rt's) Catherine Porter - Reservations W. W. Eitel - President	778 San Bruno Ave.	San Bruno	JU 8-1212
DALMO VICTOR Alice Karmer - Reservations (75 rt's) T. I. Mosley - President	1515 Industrial Way	Belmont	LY 1-1414
LENKURT ELECTRIC Bob Ulrich - Traffic Mgr. (72 rt's - est.)	1105 Old Country Rd.	San Carlos	LY 1-8461
SYLVANIA ELECTRIC PRODUCTS Mrs. Dorothy McCarthy Sam Ferguson - Gen. Mgr. Herb King	820 Fabian Way	Palo Alto	YO 8-0051
SHOCKLEY SEMI CONDUCTOR Marge Felton (21 rt's)	391 San Antonio Rd.	Palo Alto	DA 6-1300
VARIAN ASSOCIATES Mr. H. Horn (48 rt's)	611 Hanson Way	Palo Alto	DA 6-4000
LOCKHEED AIRCRAFT I. E. Root - Exec. V.P. & Gen. Mgr. Charles Couch - Traffic Clerk - Air Tony Lauer - Traffic Mgr.		Moffett Field	RE 6-9611

EXHIBIT NO. BOE-18

People Contacted by Charles L. Strickler

✓ The Honorable George Christopher
Mayor, City & County of San Francisco
Office of the Mayor
San Francisco, California

✓ Mr. Joseph Martin, Jr.
President
Public Utilities Commission
400 Montgomery Street
San Francisco, California

✓ Daniel F. Del Carlo
Vice President
Public Utilities Commission
200 Guerrere
San Francisco, California

Mr. Stewart N. Greenberg
Member
Public Utilities Commission
287 City Hall
San Francisco, California

✓ Mr. Frank J. Needles
Deputy City Attorney
City Hall
San Francisco 2, California

Mr. Jack Goldberger
President
San Francisco Labor Council
240 Golden Gate Avenue
San Francisco, California

Mr. George Johns
Executive Secretary
San Francisco Labor Council
2940 - 16th Street
San Francisco, California

✓ Mr. E. D. Maloney
President
San Francisco Chamber of Commerce
San Francisco 4, California

✓ Mr. Benjamin H. Swig
Fairmont Hotel
San Francisco, California

✓ Mr. Thomas J. Mellon
390 First Street
San Francisco, California

✓ Mr. Roger D. Lapham
President
City Planning Commission
233 Sansome Street
San Francisco, California

Charles R. Blythe
Blythe and Company
Russ Building
San Francisco, California

Mr. Roy N. Buell
President
Down Town Association of San Francisco
57 Post Street
San Francisco 4, California

✓ Mr. Thomas Gray
Executive Secretary
Down Town Association of San Francisco
57 Post Street
San Francisco 4, California

Mr. William Malone, Attorney
1120 Mills Tower Building
220 Bush Street
San Francisco, California

✓ Mr. Chester R. MacPhee
Bureau of Customs
San Francisco 26, California

✓ Mr. Dudley W. Frost
General Manager
Port of Oakland
Grove Street Pier
Oakland 7, California

✓ Mr. J. Kerwin Rooney
Port Attorney
Port of Oakland
Grove Street Pier
Oakland 7, California

Mr. Norris Nash
President
Oakland Chamber of Commerce
Oakland, California

Mr. William Sparling
General Manager
Oakland Chamber of Commerce
Oakland, California

EXHIBIT No. BOE 21

WEEKLY EXPENSE STATEMENT

(SEE AA REG 30-9)

PURPOSE OF EXPENSE	NAME Charles L. Strickler	EMPLOYEE NO. 37774	
	PERIOD OF EXPENSE (INCLUSIVE) January 25 - January 31, 1959	BASE STATION LCA	
	POSITION Assistant to Vice President	DEPT DIV Adm.	

	SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	TOTAL
DATE	1/25	1/26	1/27	1/28	1/29	1/30	1/31	
FLIGHT EXPLANATION (ATTACH FORM T7)	STA TIME	STA TIME	STA TIME	STA TIME	STA TIME	STA TIME	STA TIME	
GOING ACTUAL DEPARTURE			DCA 10:40a					
ARRIVAL			SFO 5:30p					
RETURNING ACTUAL DEPARTURE						SFO 9:15a		
ARRIVAL						DCA 8:45p		
BREAKFAST				1 70	1 60	75		4 05
LUNCH				(3)11 25	(3)10 90			22 15
DINNER			5 15	11 50	(5)45 15			61 80
HOTEL (ATTACH RECEIPTS)			20 00	20 00	20 00			60 00
TEL & TEL*			30		15			45
LAUNDRY, VALET, ETC. (ATTACH RECEIPTS)				5 50				5 50
TAXI*		1 20	3 75	4 50	6 25	7 70		23 40
AUTO EXPENSE GEN. TRAVEL ☐ ___ MILES	( )	( )	( )	( )	( )	( )	( )	
AUTO EXPENSE TRANSFER ☐ ___								
AUTO EXPENSE TOLL EXPENSE*								
OTHER TRANSPORTATION*								
Miscellaneous			4 50	8 75	19 50	2 50		35 25
TOTAL		1 20	33 70	63 20	103 55	10 95		212 60

TOTAL EXPENSE ccccccccccc Two hundred and twelve DOLLARS ccccccccccc sixty CENTS

*EXPLANATION OF EXPENDITURES

LESS	ADVANCE (1/16/59 - [illegible] (1/22/59 - 250.00)	309 15
	ATP TICKETS	
BALANCE DUE CO.-[redacted]	84353 (DATE)	96 55
BALANCE DUE EMPLOYEE (CHECK BOX BELOW)		

☐ CREDIT PERSONAL ACCOUNT
☐ SEND CHECK TO:

CHARGE STA 903 CODE 86-1 DEPT/DIV/SE 440 AUDITED

EXPENSE APPROVED BY: DD Taylor

EXCESS APPROVAL (INITIAL) DDT

SIGNATURE OF EMPLOYEE Charles L. Strickler

[BOE 22]

July 17, 1958

Mr. B. H. Smith

I have a copy of your note to Al Henderson on the proposal to introduce legislation in California for a "Golden Gate Authority."

Joe Martin, P.U.C. member whom you know, has long been an advocate of a port authority set-up to include the entire Bay area. It is my understanding that when he leaves his present job, he plans to devote most of his attention to the establishment of such an authority. The next time you or Al or I see him, we ought to try pin him down a little bit and to educate him to our side of the story.

Morris Shipley

MS:IK

cc: Messrs. A. R. Bone, Jr.
A. W. Henderson

[8978]

[BOE 23]

January 30, 1959

Mr. Thomas J. Mellon
Vice President & General Manager
Wesix Electric Heater Company
390 First Street
San Francisco, California

Dear Tom:

It was very good to hear from you and thoughtful of you to write about the "First Flight Cover."

We were of course very disappointed that C.A.B. had not acted in time to permit the start of the San Francisco-New York jet service at the same time as the Los Angeles service was inaugurated. Although our whole program of jet introduction was slowed down for reason of the strike, we are still hoping to start the San Francisco-Chicago-New York service with the 707 Jet Flagship on March 1.

I am at a loss to understand the reasons for the continuing delays in the C.A.B. proceedings. The Examiner has the reputation for issuing his initial decisions promptly, yet the hearing was closed and the case submitted to him 2 1/2 months ago. There is some indication that his report will not be issued for another month or two. It is difficult to escape the conclusion that the delays have been directed from the Commission itself. If this conclusion is true, San Francisco is being miserably discriminated against.

[8979]

I have not been on the West Coast since October, but am hoping to get out before too very long. When I do, I shall look forward to a visit with you. If you should come East, I do hope you will let me know.

Sincerely,

Morris Shipley
Assistant Vice President
State & Community Affairs

bcc: Messrs. C. W. Jacob
D. D. Taylor

[8980]

[BOE 24]

Mr. C. H. Startup - SFOS
Assistant Vice President - DCA

November 9, 1956

On balance, I would think that the information with respect to the decline in commercial aircraft operations at San Francisco is worth publicizing. Perhaps before we emphasize the CAA release, we should make an effort to ascertain the basic reasons for the decline in movements. Certainly our own service has increased in the last year and I would personally be surprised if either United or Western have materially cut back their services. Could you undertake the chore of finding out just what did happen? This information might give us better clues as to how to emphasize the story.

Because of some delays in the New York-St. Louis case procedural dates, it now looks as though Charlie Strickler would not be able to get to San Francisco prior to the middle of December. If this delay is undesirable, please let me know and I will make some plans to come out sooner and substitute for Charlie. Our basic objective at this time, as you know, is to convince the people that there is good basis on the merits for supporting American specifically rather than just a plea for additional service.

Morris Shipley

MS:rfd

[8981]

[BOE 25]

January 15, 1960

Mr. J. Kerwin Rooney
Port Attorney
Grove Street Pier
Oakland 7, California

Dear Kerwin:

During my visit with you in Oakland, we discussed the possibility of including in your Brief in the Southern Transcontinental Case a section on the Oakland-Los Angeles-San Diego segment.

Some suggested language is attached. As you will note, this is basically a re-do of the same section you used in the Pacific-Southwest Case.

Also included is some material that you might like to use on the issue of all-cargo services in this case.

Sincerely,

Morris Shipley
Assistant Vice President
State & Community Affairs

Attachment

[8982]

[BOE 25 - P.2]

THE ISSUE OF RESTRICTED OAKLAND/SAN FRANCISCO-LOS ANGELES/LONG BEACH-SAN DIEGO SERVICE

The City and Chamber have heretofore pointed out in the Dallas-West Case, CAB Docket No. 7596 (consolidated herein), and the Pacific-Southwest Local Service Case, CAB Docket No. 5645, and have presented testimony and exhibits in this case attesting to the urgent need for additional nonstop authorizations in the important Oakland-Los Angeles and Oakland-San Diego markets (see Oakland ____________).

While we believe that full relief of the present inadequacies of service can only be obtained in the Pacific-Southwest Local Service Case where the issue of unrestricted authorizations is ripe, the question of restricted grants in these markets is involved in this case and we believe there are substantial public benefits to be gained by authorizations closing the gap between the Bay Area and Southern California.

1. Bay Area-Los Angeles is the largest market in the U.S., yet it has only three nonstop carriers -- far less than such East Coast markets as New York-Washington and New York-Boston, which it outranks. Clearly certification of additional nonstop authorizations between Bay Area and Los Angeles is overdue.

2. The important Bay Area-San Diego market has only one nonstop carrier with the inevitable inadequacies in service that results from lack of competition.

3. All four of the cities involved -- Oakland, San Francisco, Los Angeles/Long Beach and San Diego -- have suffered from service deficiencies as a result of the inadequate authorizations in these major markets. It is Oakland, which has suffered the most. The present carriers have been totally unresponsive to Oakland's need for nonstop service to and from the Southern California area.

[8983]

[BOE 25 - P. 3]

4. All of the eight applicants seeking authority to serve Oakland/San Francisco in this case either propose or already have authority to provide service between the Bay Area and Southern California. Obviously, the ability to route long haul flights and combine traffic flows from Texas and the Southeast to both Los Angeles and the Bay Area will result in more service to Oakland/San Francisco and will provide some small measure of relief to the presently inadequately served local traffic.

For all of these reasons, Oakland urges upon the Examiner that carrier authorizations recommended in this case be permitted to serve both the Bay Area and Southern California points on the same flight.

CARGO

Witnesses for Oakland have testified to the need for and importance of adequate air cargo service. An integral part of an adequate airfreight pattern is all cargo service. Oakland is not provided with this service today. The east Bay Area with its heavy industrialization, its concentration of major military depots and its airport facilities is ideally situated as a base for Bay Area airfreight. Five of the applicants propose all cargo service for the Bay Area. Only three of these five are currently offering any all cargo service on their existing routes today. And only one of these three operates anything other than small capacity, 2-engine airfreighters on a regional basis.

Oakland urges upon the Examiner the need for the establishment of a southern transcontinental route to be served by a carrier equipped and able by past experience to develop, promote, and service the growing demand for modern airfreight service.

[8984]

[BOE 26]

AMERICAN AIRLINES

Interoffice Correspondence

* * *

To: Mr. G. E. Coon - SFOS
Date: September 18, 1959
From: Zone Sales Manager - OAKS
Subject: Political Contacts
Attention

This is in reply to your letter of June third. We discussed this on the phone, but I guess it is always best to put it down in writing.

Shortly after receipt of your letter, I contacted the Political Editor of the Oakland Tribune, Mr. Don Thomas, and made a personal call on him. He was most helpful and supplied me with names, addresses, secretaries, and phone numbers for most of the people we are interested in.

No action on follow up has been made up to now, since Congress has just adjourned, and the State Legislature did so only shortly before.

But now that these gentlemen are home and have had a chance to get squared away, I intend to start contacting them or their secretaries systematically.

J. E. Watkins

JEW:al

[48]

[Stamp]
Civil Aeronautics ~~Authority~~ Board

Docket No. 9214 Exhibit No. BOE 26

Witness Coon

(Complainant's
(Defendant's
(Authority's
(Respondent's
(Protestant's
(Applicant's
(Intervener's

Date 8-16-60

Reporter /s/ JL

[8985]

[BOE 27]

Stamped: AMERICAN AIRLINES
FEB 9 1959
RECEIVED
Sr. Vice Pres.-Sales

February 6, 1959

QAP
we must
but let TWA [illegible]
getting AA in SFO
DG

Willis Player - NYCP

District Sales Manager - SFOS

707 Press and Courtesy Flights - San Francisco

It is very important that San Francisco be given a Press and several courtesy flights with the Boeing 707 for the following reasons:

1. American Airlines has not had a Press flight in San Francisco for more than five years.

2. TWA personnel in San Francisco are making it known that they intend to inaugurate 707 service here to New York on or about April 1, and that prior to this time, they will operate a special Press flight for San Francisco alone plus courtesy flights for travel agents, VIP's, the traffic departments of important companies, civic officials of the Bay Area communities and frequent travelers.

3. We have many people in the San Francisco newspapers, City Hall, chambers of commerce, important trade associations to whom we are greatly indebted for their consistent and steadfast support to help remove our restrictions forbidding non-stop service to New York and in helping us become established in this market.

   Since the Non-Stop Case is still pending, our ability to entertain the newspapermen on a Press flight and our other friends on a courtesy flight would not only repay them for their past efforts but would greatly bolster their enthusiasm for the final effort to come.

4. As you may be aware, our position in San Francisco is unusual in that we are far from being the dominant carrier. We are far behind United, TWA, Western and Pan American in number of flights and volume of passengers. If we have aspirations in San Francisco, this would seem a most appropriate time to exploit our lead in equipment. Strong identification as the industry leader, though denied full participation, would be most beneficial.

We feel that we will need in addition to a transcontinental Press flight, at least five one-hour courtesy flights to accommodate the important people listed above, and we sincerely hope that equipment availability and pilot training will permit us to have these operations prior to the inauguration of service.

It would be very sad to have TWA do the job instead of American and for us to lose the many advantages of this great opportunity.

GEC:lh G. E. Coon

cc: Messrs. C. R. Speers - NYCP
A. R. Bone, Jr. - LAXSR

Stamped:
RECEIVED
FEB 11 1959
Exec. Vice President
Sales

[8986]

[Rec'd May 2, 1957] [BOE 28]

Mr. C. H. Startup - SFOS
Regional Vice President-Sales - LAX

April 30, 1957

Charlie Strickler is planning to arrive SFO on flight #67 on Monday, May 6. He will spend Tuesday with Needles and will attend the meeting of the PUC which will take action, for the city, on our application.

It is suggested that you, Burck, Charlie and Tom Barbour get together on Wednesday morning for a caucus regarding personal contact activities during the ensuing 30 days. Maybe Burck will want to go to SFO on Tuesday morning so as to sit in on the PUC hearing.

As you know, I'll be unable to be in SFO during the week of May 6. It is my present plan to be there on May 15 and 16, when I'll make whatever contacts your caucus determines that I should make.

Strickler plans to remain in SFO through the weeks of May 6 and May 13.

/s/ A. R. Bone
m
A. R. Bone, Jr.

cc: Morris Shipley
C. L. Strickler
Burck Smith
W.H . Hipple

[8987]

[BOE 29-1]

AMERICAN AIRLINES SFO tmr

Interoffice Correspondence

Date: June 25, 1958

To: Morris Shipley - Washington

Attention: Stotler

From: Regional Vice President-Sales - Los Angeles

Subject: San Francisco/Oakland Activities with VIP's

Reference: Taylor J + R

In line with our discussions about getting better established with the top people in San Francisco, Elmo and I had a luncheon at the Bohemian Club last Thursday for Al Schlesinger, President of the Downtown Association, Lee Ettelson, Publisher of the Call Bulletin, Dion Holm, City Attorney, our friend Frank Needles, Deputy City Attorney, and Dick Pearce, editorial writer for the Chronicle. Since our interests in San Francisco are common at the moment, we also had Bob Murray, Executive Vice President of Pan American, along, and Tom Barbour, of course, was there.

It was set up to be an entirely social gathering, but by coincidence it happened to be set for the day on which the postponement of the SFO-NYC-non-stop hearing was announced so there was much discussion about that, all with high indignation on the part of the good citizens of San Francisco.

We called upon and Commissioned as an Admiral of our Flagship Fleet Charles Theriot, Publisher of the Chronicle, the same afternoon.

The next day we had a luncheon in Oakland for Bob Flynn, President of the Oakland Chamber of Commerce, who is also Division Manager of Pacific Telephone and Telegraph Co., R. Stuart Moore, President of Los Angeles-Seattle Motor Express, Inc., and the most active and influential citizen of Oakland with regard to transportation matters, and George M. Keffer, Vice President and Manager of the Crocker-Anglo National Bank, Oakland.

As promised, we propose to have some sort of a get together with influential citizens each time I visit San Francisco, which is about once every three weeks on the average, and as discussed at the Sales Council Meeting in New York the other week, we shall get other officers of the company to participate in similar get togethers whenever possible.

/s/
A. R. Bone, Jr.

ARB:jn

cc: Charles A. Rheinstrom, C. W. Jacob

P.S. The attached editorials from the Call Bulletin and the Examiner, copies of which were sent to Jacob and Taylor, were a direct consequence of the conversation at the luncheon.

ARB

[8988]

[BOE-29-2]

CAB FUMBLES AGAIN

THE LATEST FUMBLING by the Civil Aeronautics Board in the San Francisco-New York nonstop route case makes it extremely unlikely that San Francisco will get nonstop jet airliner service to the east coast in time to be competitive with Los Angeles.

Thus it appears that the CAB, a regulatory body mired in confusion and languor, will repeat the wrong and the insult inflicted upon San Francisco in the late 1940's when this city was denied nonstop transcontinental service with piston airplanes until 18 months after such service had come to Los Angeles.

That injury of the 1940's worked deep. It disadvantaged San Francisco for years both in commerce and in the struggle for world air routes.

The delay in competitive jet services will have consequences as bad, perhaps worse.

Example: When the Los Angeles-New York jets go into service in November a traveler between San Francisco and New York will find he can save one to three hours going via Los Angeles. This will further weaken the existing and insufficient San Francisco-New York nonstop service with piston planes.

Example: Simultaneously with the Los Angeles-New York jet service, jet runs will begin from New York to Europe. A traveler between San Francisco and Europe will save several hours flying jets via Los Angeles and New York. This will damage the San Francisco-Europe polar route service for which this city long struggled, and which is only now becoming firmly established.

Example: A traveler bound between New York and the Orient via California will save several hours going jet via Los Angeles and bypassing San Francisco. This will strike hard and directly at San Francisco's commercially vital position as gateway to the Orient.

THE UNFORGIVABLE part in all this is that the CAB has been warned repeatedly by San Francisco over the last two years that the injury would recur unless it acted with speed and resolution. But it continued on its bumbling way, even after granting in January what it was pleased to call an "expedited" hearing. If its paper shuffling since then has been expeditious, Heaven help the cities awaiting its decision in non-expedited cases.

Last week the final blow fell. A windup hearing, pleaded for by the city in July, was put off by the CAB till September 9. Barring a miracle that means a decision cannot come before the commercial jets begin flying in November.

This is not regulation in the public interest. This is intolerable indifference to the vital interests of a great city.

[8989]

[BOE-29-3]

THE CALL BULLETIN
EDITORIAL PAGE
10 Monday, June 23, 1958 *R

CAB POKES ALONG

WHATEVER the reason for the Civil Aeronautics Board's decision to postpone again the already long-delayed hearings on San Francisco's plea for non-stop transcontinental jet airline service, it was unjustified and inexcusable.

City Attorney Dion Holm has rightly protested against this bureaucratic procrastination, on the valid grounds that, if the CAB continues to stall around, San Francisco will be months behind Los Angeles in obtaining jet service.

What this means as a practical matter is that southern California will reap the benefits of service which otherwise could, and which should, be provided also for northern California. If American Air Lines, for instance, can send its jets non-stop from L.A. to New York, the passenger who wants to fly east in a hurry may well find it worthwhile to hop down to Los Angeles and take off from there.

As an agency which purports to operate in the public interest, the CAB owes it to San Francisco and everyone served by the airlines operating out of International Airport to stop dragging its feet in this matter. Procrastination in this case adds up to rank discrimination against San Francisco.

[8990]

[BOE 30]

July 22, 1958

The Editor
San Francisco Examiner
San Francisco, Calif.

Dear Sir:

I refer to the editorial of Monday, June 23, entitled "CAB Fumbles Again" in which the Examiner discusses its opinion of the effect of the setting of September 9 as the date for the final hearing in the New York-San Francisco Nonstop Case, Docket 9214 et al.

Order No. E-12103, issued by the CAB last January 13, began an expedited proceeding to determine whether nonstop service between New York and San Francisco by a third airline is in the public interest, and if so which airline should be certificated to provide such service. I can assure you that the Board appreciates fully the desire of San Franciscans for a swift decision in these matters. As in any case, however, the Administrative Procedures Act and the Civil Aeronautics Act of 1938 as amended require careful protection of the rights of all parties. Because of the procedural process which must be observed, the Board is often prevented from rendering a final decision as swiftly as may be desired by some interested persons.

For your information, I enclose a chronology of the San Francisco nonstop case to date.

I should point out that I am somewhat concerned over a growing misapprehension that certification of a third nonstop carrier, or that it necessarily will be American Airlines, will be the result of this case. The issues in this proceeding are complex and controversial. Since

[8991]

American and Northwest seek to duplicate the authority held by United and TWA, it is essential that the latter carriers be afforded a fair opportunity to present facts as to the effects such duplicate services will have on them as well as such evidence as they wish to offer on the question of whether there is need for the proposed service. Whether a third service will be authorized, and if so, by what carrier, is solely dependent upon the record to be developed before the Board.

Your continuing interest in this case is greatly appreciated. As any additional questions about it arise, I shall be happy to try to answer them.

Sincerely yours,

/s/ Wm . Kloepfer, Jr., Chief
Office of Information

Enclosure

[BOE 31]

AMERICAN AIRLINES

Interoffice Correspondence

Date January 7,1958

To A. R. Bone, Jr. - LAXS

Attention

From District Sales Manager - SFOS

Subject

Reference

I am returning the file of tear sheets that you left with me last month. You asked that I inform you as to what distribution we gave to the newspaper stories of this type. We normally send copies to you, Morris Shipley - Washington, and C. W. Jacob in New York. If you would like for us to add others to this list, let me know, and we will do so.

G. E. Coon

GEC/lgn
attachments

[8993]

[BOE 32]

July 15th, 1958
(Dictated July 14th)

G. E. Coon - SFOS
Regional Vice President-Sales - LAXS
Newspaper Clippings

I received in this morning's mail a reprint of the editorial from the San Francisco News of Wednesday, July 2nd, entitled "A Tip of the Boot."

In line with our previous agreement, please see to it that there is some indication on such reprints of those to whom copies have been sent. Also, as long as you are running them off on your copying machine, send me three or four copies instead of just one.

A. R. Bone, Jr.

ARB:jn

[8994]

[BOE 33]

August 12, 1958

Tom Barbour - SFOS
Regional Vice President-Sales - LAXS
SFO-NY Non-stop Hearing Coverage

Thanks for sending me the clips on the SFO-NY non-stop hearing.

This is mighty fine coverage, and you are certainly to be congratulated for your major part in assuring it.

A. R. Bone, Jr.

ARB:jn

cc: W. H. Hipple
G. E. Coon

[8995]

[BOE 34]

Press

Charles A. Rheinstrom - New York

March 30, 1959

Regional Vice President-Sales - Los Angeles

West Coast Board Meeting

46

I didn't have an opportunity to talk to C. R. about the Board meeting on the coast, but I did discuss the matter some more with Walt Candy and when I was in San Francisco I talked to Bob Miller about it. We all agree that the ideal month for the meeting would be September, with the Board first visiting San Francisco and holding the meeting there, then proceeding to Los Angeles. September is a pleasant month to visit the Pacific Coast, and I understand that Jake and Shipley are of the opinion that the San Francisco-New York Nonstop Case is likely to be decided during that month. If it has been decided by the time of our meeting the presence of our Board in San Francisco will be good recognition of the increased importance of San Francisco to us; if we haven't received a favorable decision by that time, the publicity associated with the Board Meeting in San Francisco might be a subtle influence for prompt action.

We all hope this can be arranged. If you want me to talk to C. R. about it, I can do that when I'm in New York next week.

A. R. Bone, Jr.

ARB:jn

[8996]

[BOE 35]

November 17, 1958

William Playor - NYCP
Regional Vice President
SFO-NYC Press Flights

Bill Hipple has told me about the conversation with you on the matter of the SFO-NYC press flights.

I think it is absolutely essential that we have such a flight before the jet service from SFO is initiated, for the following reasons:

(1) If we put on a press flight for the LAX press contacts and not for the SFO area press contacts, the latter are certainly going to resent it;

(2) The impact of such a press flight would be even greater in SFO than in LAX;

(3) We have had such absolutely magnificent support from the SFO press on our SFO-NYC nonstop case that we owe them a trip.

(4) By operating with a stop at Chicago eastbound and nonstop westbound we would dramatize the value of a nonstop NYC-SFO jet service and would increase the pressure for favorable action in the case.

We certainly cannot ignore the SFO press as far as a transcontinental flight is concerned. However, to include the SFO press on a LAX-NYC press flight would be worse than ignoring them. They feel very strongly the pre-eminence of LAX as an airline terminal. We have never done anything for the SFO press except in a casual fashion and in my very firm opinion we must certainly take advantage of this golden opportunity in the interest of both publicity and strengthening our position in the route case.

A. R. Bone, Jr.

ARB/gb

cc: Chas. A. Rheinstrom - NYCP
C. W. Jacob - NYCP
G. E. Coon - SFOS

5

[8997]

[BOE 36]

MINUTES
REGIONAL SALES MEETING
San Diego May 1,1959

PRESENT:

A. R. Bone, Jr. ✓
F. M. Burg
Burck Smith
Wm. F. Howe
G. L. Crothers
D. U. Stark
K. Lee
G. E. Coon
N. L. Hess
M. A. Atkinson, Jr.
Wm. Sample, Jr.
K. G. Dixon

M. Howlett
J. Brady

L. J. Raymond)
) Dickie-Raymond
A. Wilson)

E. Angstadt)
) Young & Rubicam
E. Bond)

- -

ADVERTISING AND PROMOTION

(Angstadt and Bond of Young & Rubicam made a presentation of their firm's organization and policies at the previous day's meeting held jointly with Operations.)

Brady stated there is no objection to contacts and discussions between DSMs and local representatives of Young & Rubicam for exchange of information. However, it should be understood that actions with respect to the AAL advertising program must be handled through the General Office and the headquarters for Young & Rubicam.

Field offices of Young & Rubicam will work with DSMs in securing newspaper position, and provide position reports.

Raymond and Wilson explained the operational methods of Dickie-Raymond, the working relationships with AAL and the usage of the new Sales Promotion Work-Kit.

It was agreed that local mailings will be produced on a better quality process than Ditto or Mimeograph, unless exceptions because of urgency in timing are approved by Burg, in the case of passenger mailings, or Stark, in the case of cargo mailings.

Each DSM will review the local mailing lists maintained in their offices, and send Burg their comments concerning the lists they believe should be continued. Duplication with Centralist should be avoided.

Consideration is being given to sorting and distributing to DSMs the contacts resulting from the reply cards received from the Sheraton list mailing. Also, imprint lists from the new ATP cards, which will include the card holder's address, may be supplied to local Sales offices.

DSMs will write Howlett, copy to Burg, of any specific instances of breakdowns in Centralist procedures.

Howlett discussed the specific 1959 plans for production of display material. Ticket office displays will be custom-made for particular locations.

Stark recommended that a ticket office counter card to advertising airfreight be produced, and a jumbo airfreight card mailer. Howlett will handle.

Burg will handle a suggestion that the smaller stations draw on the Los Angeles district stock for limited supplies of sales promotion pieces.

EXCHANGE OF COMPETITIVE TRAFFIC FIGURES

Bone restated the company policy that traffic figures will not be exchanged with competitors. DSMs should, however, be alert to other opportunities for securing and reporting information concerning competitive traffic.

1959 SALES PROGRAM

Burg, Stark and Crothers reviewed progress in the categories of the Program with which they are concerned.

Bone reminded that he is available for assistance in contacts with those of the "21" accounts in the Western Region.

Burg will send DSMs concerned copies of the annual reports of the four "21" accounts in the region.

Regarding "lost ATP" business, it was agreed that a contact by mail will be made with the individual only if it is not possible to make a phone or personal contact.

Burg will propose that the rules regarding company meeting revenue credit be changed so that a sales representative will be given credit for finding and selling a group (of some minimum specified number) attending a meeting.

Concerning travel agents, Bone stated that the sales force should "talk turkey" with them, making it plain that AAL will not attempt to twist their existing commercial accounts, but that AAL must have the privilege of contacting these accounts. Also, AAL will provide the high quality of service to commercial accounts that are not now handled by travel agents that is necessary to assure that they not turn to agents for the servicing of their business.

[8999]

Start stressed the importance of increasing local direct mail activity in airfreight.

DSMs reported some difficulties in manpower for making the airfreight market analysis. As to Los Angeles, Gough will ascertain if a management candidate can be temporarily assigned to this project.

ADMIRALS

As to regional office functions, Burg is concerned with appointments and correspondence with Admirals or applicants. Crothers handles matters of regional office concern pertaining to the operation of Admirals Clubs, which is a Sales Services responsibility.

Bone stated that the main purpose of appointments is to gain favor from those whose favor AAL needs.

DSMs felt that the routine replies to applicants for membership, sent from the general office, tended to infer that the DSMs would arrange for a commission. Burg will handle with Startup.

A tendency to appoint too many Admirals within the same company was noted.

Burg will set up a procedure for handling "rush" requests for certificates.

It was recommended that a brochure on AAL be developed for presentation with Admiral certificates, incorporating some of the features of the "America's Leading Airline" piece.

#

[9000]

[BOE 37]

May 14, 1957

A. R. Bone, Jr. - LAXS

District Sales Manager - SFOS

American Airlines Standing in the
Community Report, 1957

In reviewing the attached report with the one submitted last year, it would appear that American Airlines in the San Francisco Bay Area is making considerable progress in becomming identified as a leading carrier. The action, which we are presently engaged in, in getting support for additional nonstop service for San Francisco is redounding to our credit. The addition of Royal Coachman service, which is planned for later in the year, will also give us a big boost.

I feel we have a well set up organization here in the Bay Area, both personnel-wise and with physical facilities, which should provide us with a good base on which to grow and increase our stature.

C. H. Startup

CHS:pao

[9001]

[BOE 38]

AMERICAN AIRLINES

Interoffice Correspondence Date: November 5, 1956

To Morris Shipley - DCAS Attention

From District Sales Manager - SFOS

Subject Reference

~~I thought you might like to know that last week we had a Jet Age Conference here sponsored by the Air Force Association. Our public relations man is active in the Air Force Association and in an attempt to dress up the proceedings he suggested that they make some awards for the advancement of aviation in this area. This suggestion was adopted, and among two or three other people that received awards we recommended your friend Frank Needles, and he received an award and was quite pleased. You might want to drop him a note regarding this.~~

[This ¶ not received]

Attached is a memo from Tom Barbour regarding some CAA figures showing that San Francisco and Oakland have dropped in air carrier operations. We think it has some value but are a little perplexed as to how or whether to use it or not in connection with our pending request for non stop service. It could also work against us in the Dallas to the West case. What do you think?

/s/ C.H.S.
C. H. Startup

CHS-pao

[9002]

[Rec'd May 8, 1957, C. W. Jacobs]

AA routes:
SFO-NY nonstop (Jet)

[BOE 39]

AMERICAN AIRLINES

Interoffice Correspondence

Date: May 6, 1957

To C. W. Jacob - NYCP

Attention

From District Sales Manager - SFOS

Subject Non-stop Case - San Francisco-New York

Reference

Our announcement of the filing to sever and expedite, Docket No. 5903, has met with a good reception so far in San Francisco.

A number of people have phoned or spoken to me expressing support in our action. Attached are two editorials which appeared today, one in the San Francisco Chronicle, the morning paper, and one in the Call-Bulletin, the evening paper.

Tomorrow (Tuesday, May 7th), the Public Utilities Commission will act on a resolution "Directing the filing of an answer and motion with the Civil Aeronautics Board supporting the motion of American Airlines to sever and set down for immediate hearing the San Francisco-New York non stop portion of the application under Docket No. 5903, the Commission believing that San Francisco is entitled to a third non stop air service between San Francisco and New York; requesting the Board of Supervisors to adopt a resolution in furtherance of the motion; copies of Commission's resolution to be furnished Honorable Mayor George Christopher, state senators, congressmen from the Bay Area and other interested parties."

/s/ Charlie S.

CHS:pao

C. H. Startup

cc: Morris Shipley - DCAS
A. R. Bone, Jr. - LAXS

Encl.

[9003]

S. F. PLAYING SECOND FIDDLE

WHY SHOULD San Francisco have to play second fiddle to Los Angeles in the matter of transcontinental air service?

The question is pertinent because of a request which has just been filed with the Civil Aeronautics Board by American Airlines.

What American wants is prompt and favorable action by the CAB on its application, which has been hanging fire for several years now, for permission to flight non-stop schedules between here and New York.

Despite our fancy new International Airport and our rightful claim to being the aerial "gateway to the Pacific," the fact remains that coast-to-coast air service now provided for our city is inferior to that offered by Los Angeles.

Specifically, three major carriers serve the southern California metropolis with non-stop flights to New York, whereas San Francisco has only two.

For this reason, San Francisco city officials and business leaders can and should make common cause with American in the latter's efforts to provide this city with the same kind of service which Los Angeles now enjoys.

With the advent of the jets, it becomes even more important to San Francisco to have transcontinental air service second to none.

The longer our airport is in an inferior position in this regard—the longer we are constrained to "play second fiddle"—the greater the possibility that we will lose our dominant role as an "aerial crossroads," with a consequent loss which can be measured not only in terms of prestige but in hard dollars and cents.

[9004]

[San Francisco CHRONICLE, May 6, 1957]

SAN FRANCISCO NEEDS MORE NONSTOP SERVICE

AMERICAN AIRLINES is again asking the Civil Aeronautics Board for permission to fly nonstop between San Francisco and New York. Its application, on file since 1953, ought by all standards to be granted without further delay.

Arguments previously advanced by the air line, by the City of San Francisco, by the Public Utilities Commission and the Chamber of Commerce (and heartily endorsed by the traveling public) have not only retained their compulsive power but have substantially gained in eloquence and force.

For the jet age is about to work revolutionary changes upon the air transport industry—travel time between San Francisco and New York, for instance, will be cut to 4 hours, 47 minutes. The unfavorable position of this city—which has $75 million of public money invested in its airport facilities—will further deteriorate, relative to comparable centers of aviation, unless American Airlines, which will receive its jet transports next year, is permitted to use them in nonstop San Francisco-New York service.

This city's support of the American Airlines application is based on the demonstrable fact that CAB restrictions have substantially and unfavorably affected its transcontinental service. The city contends that its interests, the public interests, require additional service. These contentions have never been questioned by the CAB, which has thus far denied the American Airlines application on grounds having to do with the competitive situation.

As a result, San Francisco is the Nation's largest center of air travel with only two nonstop services; it lags far behind Los Angeles, which has three nonstop carriers (19 nonstop flights daily between Los Angeles and New York; seven between San Francisco and New York); it is restricted to fewer nonstop flights than many airports handling fewer passengers.

Long investigation has led the CAB's Bureau of Air Operations and the CAB's own examiner to recommend authorization of a nonstop San Francisco-New York route to American Airlines. San Francisco needs it; the public interest demands it. The CAB ought no longer penalize this city and inconvenience the public by withholding it.

[9005]

[BOE 40]

13 Counties

DRAFT
FJM ec
May 2, 1957

Date

President of the Board of Supervisors
County of
City of
State of California

Re: Motion of American Airlines, Inc. in Docket No. 5903 and Answer and Motion of the City and County of San Francisco in support thereof for an expedited hearing for another nonstop service between the Bay Area and New York

Dear Mr. President:

The City and County of San Francisco is grateful to you and your fellow members for your past support in obtaining better air service for Northern California counties.

In the above entitled matter, San Francisco is attempting to have the Civil Aeronautics Board hold an immediate hearing on the need for a third nonstop service to New York City.

Our communities representing over 3-1/2 million people are deprived of adequate and much needed air service to the East Coast. There are approximately 700 daily passengers to New York with only 474 available seats. San Francisco Bay Area with only two nonstop carriers on this route has less air service than any other major air hub in the United States.

If this hearing is immediately granted and the service awarded it will directly benefit all the residents and merchants in Northern California who wish to travel

[9006]

and are doing business on the East Coast. This added service will likewise bring more visitors and business to our communities.

May I request the Board of Supervisors of your county to adopt a resolution uring the CAB to grant an immediate hearing for this third nonstop air service to and from the San Francisco Bay Area and New York.

For your convenience I am enclosing a proposed resolution, which if adopted by your Board, will greatly assist San Francisco in its endeavor to obtain better service for our communities.

Would you kindly forward to me five (5) copies of your adopted resolution?

Thanking you for your past favors and for your assistance in this matter, I am

Sincerely,

GEORGE CHRISTOPHER,
Mayor, City and County
of San Francisco

FJN ec

DRAFT
May 2, 1957

[9007]

[BOE 41]

WHEREAS, the Board of Supervisors of the County of ___________, State of California, has noted that American Airlines, Inc., has filed its motion before the Civil Aeronautics Board to sever and set down for immediate hearing the San Francisco-New York nonstop portion of its Application in Docket No. 5903; and

WHEREAS, the City and County of San Francisco, through its Public Utilities Commission, has filed an Answer and Motion in support of the Motion of American Airlines, Inc., to immediately set down for hearing the San Francisco-New York nonstop portion of Docket No. 5903; and

WHEREAS, the County of _____________, State of California, is a part of the San Francisco Bay Area; and

WHEREAS, numerous residents of this county travel to New York and are in need of further nonstop air service over the San Francisco-New York route; and

WHEREAS, the present air service pattern between the San Francisco Bay Area and the East Coast, especially New York, is antiquated and inadequate; and

WHEREAS, there is a strong community of interest existing in the counties of the San Francisco Bay Area and New York; and

WHEREAS, the Board of Supervisors of the County of ___________, State of California, is desirous of aiding the residents of this county in furthering their business and social relationships with the cities of the East Coast of the United States, especially New York; and

WHEREAS, the inauguration of further nonstop service between the San Francisco Bay Area and New York would meet the requirements of public convenience and necessity, NOW, THEREFORE, BE IT

RESOLVED, That the Board of Supervisors of the County of ______ __________, State of California, hereby respectfully urges the Civil Aeronautics Board to sever and set down for immediate hearing the San Francisco-New York nonstop portion of the Application in Docket No. 5903, whereby further nonstop air services in the interest of this county would be inaugurated between the San Francisco Bay Area and New York City and other communities on the East Coast of the United States; and be it further

RESOLVED, That the Clerk of this Board forward certified copies of this resolution to the Civil Aeronautics Board, the United States Senators from California and the Congressmen from Northern California and the San Francisco Bay Area and to the City and County of San Francisco.

- - - - - - - - - -

I, ________________________, the duly appointed, qualified and Acting Clerk of the Board of Supervisors of the County of ______________, State of California, hereby certify that the foregoing is a full, true and correct copy of a resolution which was duly issued at a meeting of the Board of Supervisors of the aforesaid County on the __________ day of May, 1957.

____
Clerk of the Board of Supervisors
of the County of _______________
State of California.

[9008]

[BOE 42]

DRAFT 4/30/57
FJN;db

File No. (Series 1939) Resolution No.

REQUESTING THE CIVIL AERONAUTICS BUREAU TO IMMEDIATELY SEVER AND SET DOWN FOR HEARING THE SAN FRANCISCO-NEW YORK NONSTOP PORTION OF DOCKET NO. 5903.

WHEREAS, the City and County of San Francisco through its Public Utilities Commission has filed its Answer and Motion with the Civil Aeronautics Board in support of the Motion of American Airlines, Inc., to immediately grant a hearing on that portion of the Application in Docket No. 5903 which seeks further nonstop service between San Francisco and New York City; and

WHEREAS, the City and County of San Francisco believes that public convenience and necessity require that the people of the City and County of San Francisco and the surrounding area be provided with all possible, necessary and adequate facilities for air commerce to and from San Francisco and New York City; and

WHEREAS, the City and County of San Francisco believes that public interest requires an immediate hearing on further nonstop air service between San Francisco and New York City; now therefore, be it

RESOLVED, That the Board of Supervisors of the City and County of San Francisco hereby respectfully requests the Civil Aeronautics ~~Bureau~~ Board grant an immediate hearing on that portion of the Application in Docket No. 5903, whereby San Francisco would be afforded further nonstop air service to New York City.

APPROVED AS TO FORM

____
City Attorney

By ______________________
Deputy City Attorney

[BOE 43]

PUBLIC UTILITIES COMMISSION
City And County Of San Francisco
RESOLUTION NO ________

WHEREAS, the City and County of San Francisco, through its Public Utilities Commission, owns and operates the San Francisco International Airport provided by the citizens of San Francisco at great expense in order that they may enjoy the finest air transportation service possible; and

WHEREAS, the City and County of San Francisco is one of the largest cities in the West and one of the great air markets of the United States and the world and the air hub of the San Francisco Metropolitan area; and

WHEREAS, American Airlines, Inc. has on file with the Civil Aeronautics Board a motion to sever and set down for immediate hearing the San Francisco-New York nonstop portion of its Application in Docket No. 5903; and

WHEREAS, the Public Utilities Commission deems that the public convenience, interest and necessity of the people of the City and County of San Francisco and the surrounding area require that they be provided with all possible and necessary facilities for air commerce to and from San Francisco and New York City; and

WHEREAS, the City and County of San Francisco has a civic, property and financial interest in the motion of American Airlines, Inc., which would afford the City and County of San Francisco improved air service between San Francisco and New York;

THEREFORE, BE IT RESOLVED, That the City and County of San Francisco through its Public Utilities Commission is hereby empowered to file an Answer and Motion with the Civil Aeronautics Board, supporting the Motion of the American Airlines, Inc. to sever and set down for immediate hearing the San Francisco-New York nonstop portion of the Application in Docket No. 5903, in believing that San Francisco is entitled to a third nonstop air service between San Francisco and New York; and

BE IT FURTHER RESOLVED, That the Board of Supervisors of the City and County of San Francisco be, and they are respectfully requested to adopt a resolution, urging said Civil Aeronautics Board to immediately sever and set down for hearing that portion of Docket No. 5903, whereby San Francisco would be afforded a third nonstop air service to New York; and

BE IT FURTHER RESOLVED, That copies of this resolution be furnished to the Honorable Mayor of the City and County of San Francisco, the United States Senators from California, Congressmen from the San Francisco Metropolitan Area, and all other interested parties, and that they be requested to support the Answer and Motion of the City and County of San Francisco urging the Civil Aeronautics Board to immediately sever and set down for hearing that portion of Docket No. 5903, whereby San Francisco would be afforded a third nonstop air service to New York.

I hereby certify that the foregoing resolution
was adopted by the Public Utilities Commission

at its meeting of ____________________

____
Secretary

[9010]

[BOE 44]

May 9, 1957

On May 3, 1957 American Airlines filed with the Civil Aeronautics Board in Washington a motion to set down for immediate hearing the San Francisco - New York non-stop portion of its application in Docket No. 5903. The Public Utilities Commission of the City of San Francisco on May 6, 1957 adopted a resolution supporting American's motion and on May 7th filed an answer with the C.A.B. urging that American's request for severence and expedited treatment on the San Francisco - New York issue be granted and stressed the need for an additional third San Francisco - New York carrier.

Getting the C.A.B. to hear this issue out of order from its regular place on the Board's Docket is going to be a major task. We feel that this can be accomplished only with the strong support of not only the San Francisco Bay Area but the support of the Northern Half of California is necessary as well. In other words, a real "grass-roots" campaign must be undertaken.

In this behalf, one of the chores will be to seek the support of the various Chambers of Commerce. There are a great number of these and impossible for a few people to canvass. Consequently, we are soliciting the help of the Zone Managers, and Sales Representatives. What is desired from the various Chambers of Commerce is a resolution endorsing either the motion of American Airlines or the resolution of the City of San Francisco endorsing the motion of American Airlines. Unfortunately, the San Francisco Chamber of Commerce will not take action on a resolution until May 23rd. It is possible that some of the Chambers will want to wait until after the San Francisco Chamber has acted, in which event an earlier contact will have at least advised them of the issue and will not be a waste of time.

Copies of the resolutions adopted by the various Chambers should be sent to the U.S. Senators from California, the Congressional Representatives from their particular area and to the C.A.B. in Washington. It would also be desirable if a copy could be sent to American's office in San Francisco. These contacts should be started immediately.

It is extremely important that you realize that we are not seeking support at this time of American as the third San Francisco - New York non-stop carrier. We are simply asking the various Chambers to support the request that the San Francisco - New York non-stop service issue be set down for hearing and handled in an expeditious manner.

# # #

[9011]

[BOE 45]

Favorable Action Taken

1. PUC of SFO.
2. Mayor requested 13 Counties Bd of Supervisor to support PUC action.
3. PUC requested SFO C of C to support action and urge Central & Northern Calif. Chambers.
4. PUC Resolutions to:
   a. Northern Calif. Congressmen.
   b. U. S. Senators.
   c. C.A.B.
5. PUC request State Assembly pass Resolution supporting PUC position.

6. PUC to get Gov. Knight support:

Younger)
Malliard) will get copies of PUC action
Shelley) - requesting table action -
Kuchel)
Knowland)

7. Downtown Assn.

[9012]

[BOE 46]

Alameda

San Mateo

Marion

Santa Clara

Centra Costa

San Francisco

Sacramento

Yolo

Napa

[9013]

[BOE 47]

IMPORTANT CITIZENS OF SAN FRANCISCO

George Christopher	Mayor of San Francisco	200 City Hall	MA 1-0163
Joseph J. Allen	Exec. Secretary		
Patricia Connich	Confidential Secretary		
Margaret Smith	Personal Secretary		

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James Sullivan	31 W. Portal	OV 1-3910	OV 1-0861
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Finance, Revenue and Taxation - Dobbs, McCarty, McMahon
Public Utilities - McCarty, Ertola, McMahon

CITY ATTORNEY Dion R. Holm	206 City Hall	HE 1-1322
DEPUTY CITY ATTORNEY Frank J. Needles	206 City Hall	HE 1-1322
SHERIFF (Political) Matthew C. Carberry	331 City Hall	HE 1-2121
CHIEF ADMINISTRATIVE OFFICER Thomas A. Brocks	289 City Hall	HE 1-2121
CONTROLLER Harry D. Ross	109 City Hall	HE 1-2121
LEGISLATIVE REPRESENTATIVE, FEDERAL Col. Thomas J. Weed	Suite 536-7-8, Washington Building, Washington, D. C.	
LEGISLATIVE REPRESENTATIVE, STATE Donald W. Cleary	233 City Hall	HE 1-2121 or MA 1-0163

[9014]

DEPARTMENTS

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Daniel F. Del Carlo, Vice Pres.	200 Guerrero	HE 1-6515
Edward B. Baron	44 Casa Way	WE 1-8501
Don Fazackerley	170 El Verano Way	GA 1-5200
Stuart N. Greenberg	765 Folsom St.	EX 2-3143

10 30 —
5/15/Wed —
2 00 —
4 00

Bel Brown

SAN FRANCISCO INTERNATIONAL AIRPORT		
Belford Brown, Manager	PL 6-0500	JU 5-1167
Harold Messersmith, Manager of Operations		

BUREAU OF PUBLIC SERVICE (PR)		
Virgil Elliott, Director	28 City Hall	HE 1-2121

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Francis P. Walsh	Pres., Civil Service Commission	68 Post Street
Walter H. Duane	Pres., Fire Commission	220 Bush Street
Arthur J. Dolan, Jr.	Fire Commission	Blythe & Co., Russ Bldg.
Harold Berliner	Parking Authority	135 Mississippi
Randolph Hale	Parking Authority	1360 Montgomery Street
Joseph C. Tarantino	Pres., Board of Permit Appeals	490 Jefferson Street
Harold McKinnon	Pres., Police Commission	Mills Tower Bldg.
Paul A. Bissinger	Police Commission	Pacific & Davis
Thomas J. Mellon	Police Commission	390 First Street
Albert E. Schwabacher, Jr.	Public Library Commission	100 Montgomery Street
Joseph L. Alioto	Redevelopment Agency, Chairman	111 Sutter Street
Roy P. Cole	Redevelopment Agency	656 Townsend Street
Michel D. Weill	deYoung Memorial Museum	Pres., The White House
Charles R. Blythe	deYoung Memorial Museum	Russ Building
Miss Louise A. Boyd	" " "	255 California
Sheldon G. Cooper	" " "	Crocker Building
R. Gwin Follis	" " "	3960 Washington
Randolph A. Hearst	" " "	860 Howard Street
Mrs. Walker Kamm	" " "	San Mateo
James K. Lochead	" " "	464 California
Grover Magnin	" " "	St. Francis Hotel
Garrett McErnerney, II	" " "	3725 Washington
Roscoe F. Oakes	" " "	2006 Washington
Richard Rheam	" " "	235 Montgomery
Joseph O. Tobin	" " "	Hibernia Bank
Mrs. Nion Tucker	" " "	Burlington Country Club
Paul Verdier	Pres., Calif. Palace Legion Honor	199 Geary
James B. Black	Calif. Palace Legion of Honor	245 Market
Alexander deBretteville	" " " " "	2000 Washington St.

[9015]

Charles Mayer	Calif. Palace Legion of Honor	S.F.Examiner,3rd & Mark
William Wallace Mein	" " " "	315 Montgomery
John N. Rosskrans	" " " "	210 California
William R. Wallace, Jr.	" " " "	Shell Building
Louis A. Benoist	" " " "	37 Drumm Street
Walter E. Buck	" " " "	Russ Building
E. Raymond Armsby	" " " "	111 Sutter
Mrs. Bruce Kelham	" " " "	15 Arguello Blvd.
David Pleydell-Bouverie	" " " "	Glen Ellen
Whitney Warren	" " " "	285 Telegraph Hill Blvd.
Harold L. Zellerbach	" " " "	534 Battery St.

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John J. Allen, Jr. (R)	662 Longridge Road, Oakland
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SAN FRANCISCO CHAMBER OF COMMERCE	333 Pine Street	EX 2-4511
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Walter Browne	Bank of America (Vice Pres)	

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Ralph Kummer	Chairman, Aviation Committee	

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SAN FRANCISCO EXAMINER

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Linton von Beroldingen, ME
Joshua Eppinger, Asst. ME
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[9016]

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[9017]

[BOE 48]

DRAFT
FJN ec
May 9, 1957

Date

Civil Aeronautics Board
Washington 25, D.C.

Attention: ____________ Durfee, Chairman

RE: Docket No. 5903

Dear Mr. Durfee:

San Francisco, on May 7, 1957, filed its Answer and Motion in CAB Docket No. 5903, requesting the Civil Aeronautics Board to grant an expedited and immediate hearing on the San Francisco-New York segment of the above application.

As Mayor of San Francisco I heartily endorse the action of this City's Board of Supervisors and Public Utilities Commission in requesting the Board to grant an immediate hearing in this matter.

~~New York is San Francisco's second largest market in the generation of passengers (229,021 annually) and first in passenger miles (590,874,100); and San Francisco is New York's third passenger mile market and ninth in passengers. However, New York's eight other leading markets are afforded 3, 4, 5 and 6 nonstop air carrier service. In fact, the San Francisco-New York segment is the nation's leading longhaul air market, receiving only TWO nonstop carrier service.~~

San Francisco's citizens have already spent $50,000,000 in the creation of one of the nation's great airports. On their belief in the future of aviation and in preparation of the coming jet age, they authorized in November, 1956, the expenditure of an additional $25,000,000.

San Francisco, in its Answer and Motion, detailed the inferiority and inadequacy of the present air service between this City and New York. I wish to point out that San Francisco is the air hub for over 6,000,000 people. All of the communities of Northern California use the San Francisco International Airport as their transcontinental and international gateway. The expediency of the Board granting the request for an immediate hearing on the San Francisco-New York segment in Docket 5903 is of paramount importance to the present and future economic welfare and prosperity of this great section of our nation.

In our past appearances before the Board San Francisco is appreciative of the Board's consideration of our needs for better air service to the various parts of the United States and the World. However, it is our belief that the question of additional nonstop service between San Francisco-New York is the most critical of any not presently under consideration by the Board.

In all fairness and equity, as Mayor of this great community, I submit that public convenience and necessity warrant your favorable consideration ~~to~~ of our request for an expedited and immediate hearing on the sole question of San Francisco-New York nonstop authorizations.

With deep appreciation for past considerations, I am

Very truly yours,

GEORGE CHRISTOPHER
Mayor of the City and County
of San Francisco

FJN ec

DRAFT

[9019]

[BOE 49]

DRAFT
FJN ec
May 9, 1957

Date

Hon. William Mailliard
House of Representatives
Washington, D. C.

Re: San Francisco-New York Nonstop Air Service

Dear ____________:

San Francisco is vitally interested in additional nonstop air service to New York.

On Tuesday, May 7, 1957 the Public Utilities Commission adopted Resolution No. 17236, asking the Civil Aeronautics Board to set down for immediate hearing in CAB Docket No. 5903, the question of a third nonstop service between San Francisco and New York.

San Francisco, one of the great air traffic markets of the nation, receives only two nonstop carrier service between San Francisco and New York, yet New York is our City's second leading market generating 229,021 annual passengers and our leading passenger mile market, with 590,874,100; and San Francisco is New York's third most important market in passenger miles and ninth in passengers. The disparity of service the San Francisco-New York market suffers ~~receives~~ is apparent when the nonstop service afforded New York's eight other leading markets is considered. To illustrate: New York-Miami (3); New York-Chicago (5); New York-Boston (4); New York-Washington (6); New York-Los Angeles (3);

New York-Detroit (4); New York-Pittsburgh (4); and New York-Cleveland (3).

If public conveience and necessity ~~is~~ are considered, as provided in the Civil Aeronautics Act, 1938, as amended, San Francisco, as a matter of justice, is entitled to air service comparable to that given the other great air centers of our nation.

For the reasons set forth above and as more graphically depicted in San Francisco's Answer and the Public Utilities resolution enclosed herein, I heartily endorse the resolution of the Public Utilities Commission that calls upon you and me, the Board of Supervisors, and our other national representatives in the Senate and the House to urge the Civil Aeronautics Board to grant an immediate hearing on San Francisco's request in Docket No. 5903.

As Mayor of San Francisco may I personally request that you exert all possible effort to obtain an immediate hearing before the Civil Aeronautics Board on this paramount air service issue affecting the welfare and prosperity of our community.

With kindest personal regards and with sincere appreciation, I am

Sincerely,

Mayor of the City and County
of San Francisco.

FJN ec

DRAFT

[BOE 50]

PUBLIC UTILITIES COMMISSION
City And County Of San Francisco
RESOLUTION NO. 17,237

RESOLVED, That this Commission hereby requests the San Francisco Chamber of Commerce to immediately endorse the policy as expressed by the Public Utilities Commission and actively participate in obtaining an expedited and immediate hearing before the Civil Aeronautics Board in the motion of American Airlines, re third non-stop service between San Francisco and New York, Docket No. 5903; and

BE IT FURTHER RESOLVED, That the San Francisco Chamber of Commerce is hereby requested to urge and request all other Chambers of Commerce in northern and central California to aid and participate in obtaining an immediate hearing in the motion of American Airlines, re third non-stop service between San Francisco and New York, Docket No. 5903.

U.S. Senators & Congressmen
& CAB.

[9022]

[BOE 52]

AMERICAN AIRLINES

Interoffice Correspondence

Date Nov. 2, 1956

To C. H. Startup - SFOS

Attention

From Manager Public Relations - SFOS

Subject

Reference

The following summary of the new CAA statistics is in startling and incontrovertible support of the contention that San Francisco and Oakland are suffering from discrimination in the denial of additional airline services.

Maybe we should sent it to newspaper editors, editorial writers, local congressmen, public utilities officials, business firms, civic leaders, and any others whose support we may desire.

Although our program toward elimination of the restriction doesn't start right away, the subject-matter is news at the moment, and should be brought to the attention of newsmen before it is too old (probably right after the election). Other efforts, of course, can wait until Spring.

/s/ Tom
T. W. Barbour

[9023]

[BOE 53]

San Francisco
PUBLIC UTILITIES COMMISSION
Department of Public Service
William Simmons, Director
Room 287, City Hall
Hemlock 1-2121, ext. 651

Charlie: might be interesting story.

FOR RELEASE MONDAY,
NOVEMBER 10, 1958

The City of San Francisco, for the 10th time, today urged the Civil Aeronautics Board in Washington, D. C. to approve a third nonstop air carrier between San Francisco and New York.

In the City's final brief in the expedited San Francisco-New York Nonstop Case, City Attorney Dion Holm, in behalf of the Public Utilities Commission, asked the CAB to grant the additional service, stating that the decision will affect the destiny of San Francisco as a major air transportation and commercial center.

"San Francisco is fighting for an adequate route structure to fulfill all of its Jet Age requirements," the brief stated. "The authorization of a third nonstop carrier in the San Francisco-New York market would assure a non-recurrence of the service lags and deficiencies that have plagued this market over the past many years."

The brief asserts that there has not been competitive service between existing carriers in this market and that the service rendered has been inferior and inadequate.

The brief said the best remedy for the deficiency would be removal of the restriction on American Airlines' San Francisco-New York service, rather than the granting of a new route to Northwest Airlines.

(More)

[9024]

It stated that while the City has refrained historically from favoring one new route applicant over another, that the Public Utilities Commission has concluded the public convenience and necessity demand a departure from the long-established policy, although it reserves the right to revert to the former policy hereafter.

"Now that the record of this case is in," said the brief, "since the outcome so vitally affects the stature of San Francisco in the nation's air transportation economy, and since the proposal of American Airlines is so overwhelmingly superior to the proposal of Northwest, San Francisco can no longer remain neutral.

"Consequently, it is the position of San Francisco that only the proposal of American Airlines affords a full and satisfactory solution to the imminent, pressing, and long-range needs of the San Francisco-New York market."

The brief, filed with the Board today, restated the City's case with a long list of arguments:

It said the importance of the San Francisco-New York market clearly justifies three nonstop carriers, because it is one of the nation's most important, and the most important to San Francisco; that a third nonstop carrier will benefit nearly six million residents of Northern California; and that San Francisco-New York is the leading market in the county with less than three nonstop carriers.

(More)

[9025]

It further stated that the San Francisco-New York route structure is inferior and entitled to be modernized, because it has lagged in development behind other routes.

The brief cited the City's huge investment in a modernized airport and said, "The people of San Francisco have expressed their confidence in the jet age and it is urged that this confidence be recognized by the Board in providing San Francisco with an adequate jet route structure in its most important long-haul market."

"Consideration must be given to not only the local Bay Area population," the brief pointed out, "but to the nearly 6,000,000 population of the area that extends from Monterey/Fresno, on the south, to Medford/Klamath Falls, on the north, and as far east as Reno. These are the people who will be using the San Francisco International Airport on their air trips to and from New York, and their needs in this regard must therefore be considered along with those of San Francisco."

# # #

[9026]

[BOE 55]

FROM: AMERICAN AIRLINES
Tom Barbour-Public Relations
1420 Russ Building
San Francisco, California
YUkon 2-4620

Release
5/2/57

FOR RELEASE AT ~~3~~ 2 PM PST. FRIDAY MAY 3

WASHINGTON -- The Civil Aeronautics Board today was urged to permit San Francisco to share fully in the rapidly approaching transcontinental jet air age by authorizing American Airlines to fly nonstop between San Francisco and New York.

In a motion filed with the CAB, American Airlines asked the board to expedite its application -- on file since 1953 -- to fly nonstop between San Francisco and New York. It said the "authorization of an additional nonstop San Francisco-New York carrier is essential to permit this, the nation's largest market with only two nonstop carriers, to meet the requirements of the revolutionary jet age -- which is virtually at hand."

Both United and Trans World Airlines presently have authority to operate nonstop flights between San Francisco and New York but all of American's flights are required to make a stop en route between the two cities. It is this restriction which American Airlines asked the CAB to remove, in an expedited proceeding.

Consultations with San Francisco officials, American said, have "confirmed the view that San Francisco's most important need is for service by a third nonstop carrier to and from New York. This is the leading traffic segment among the top ten passenger and passenger-mile markets in the country, which is served by only two nonstop carriers. The other principal transcontinental market -- Los Angeles-New York is served by three such carriers. The discussion with San Francisco officials

[9027]

also confirmed the view that this less favorable route structure has produced marked deficiencies in San Francisco-New York service -- e.g., lag in nonstop service (coach and standard) and inadequate and inferior nonstop service in terms of flights and seats."

The airline listed among many, four primary reasons why such authority should be granted:

1. Because of inferior nonstop authorizations, San Francisco has consistently lagged behind Los Angeles in receiving new nonstop services to and from New York.
2. Because of inferior nonstop authorizations, San Francisco nonstop service is inferior and inadequate.
3. The importance of the San Francisco-New York market entitles it to three nonstop carriers.
4. Authorization of a third San Francisco-New York nonstop carrier is a jet age imperative.

Pointing out that it will start receiving its jet transports in 1958, American Airlines said it is imperative for the CAB to act now to correct the deficiencies of the San Francisco-New York nonstop service. It said the shortcomings in San Francisco's air service "are serious enough as matters now stand, but they will be far more grave in the rapidly-approaching jet age because of the great time advantage which the jets will have over present equipment.

Thus, a San Francisco-New York jet nonstop will be 37.7% faster than a DC-7 nonstop, 4 hours and 47 minutes as against 7 hours and 40 minutes. This great increase in speed obviously will have a tremendous

impact on all long haul markets and will enhance substantially the appeal of transcontinental air travel. The introduction of new equipment always has an effect of this kind, but because of its revolutionary nature, the introduction of jet aircraft will have a far greater impact than that of any previous aircraft."

San Francisco-New York nonstop service has consistently lagged behind that of Los Angeles-New York, American's motion stated. "There are now 19 daily nonstops in both directions between Los Angeles and New York but only 7 between San Francisco and New York." Nonstop coach flights between San Francisco and New York were not instituted, the motion declared, until nearly a year after Los Angeles-New York had received such service.

-AA-

tb5/2/57

[9029]

[BOE 56]

FROM: AMERICAN AIRLINES
Tom Barbour-Public Relations
1420 Russ Building
San Francisco, California
YUkon 2-4620

SAN FRANCISCO-NEW YORK NONSTOP CASE

Although the Civil Aeronautics Board Bureau of Air Operations and the Civil Aeronautics Board Examiner (in the Denver Service Case) found a need for, and recommended, a third nonstop transcontinental air carrier for San Francisco after many months of thorough study, the Board denied San Francisco a third nonstop carrier. The grounds cited for the denial was the belief that the applicant (American Airlines) was so strong economically that it would "dominate the market."

American Airlines and the City of San Francisco are again seeking a remedy to the inadequate San Francisco-New York nonstop route pattern. They filed motions with the C.A.B. requesting an immediate hearing on the matter, which were denied subject to study by the Board's Staff, which is due to be completed by December 1. A request by the City to participate in the Staff Study was also denied.

American Airlines, it is true, is the Nation's principal carrier by most accepted indices, but recent traffic developments prove that it's routes are not inherently superior to those of the other transcontinental carriers, United and TWA.

Thus, in July, 1957 United carried 485,838,000 passenger miles as compared to 472,211,000 for American.

In August, 1957, the gap between United and American widened. In

[9030]

that month, United carried 518,500,000 passenger miles, while American carried only 482,674,000 passenger miles.

TWA has also been making great strides in improving its traffic position. According to Aviation Daily (September 17th), Mr. Carter Burgess, President of TWA, states that TWA was up 26% in July, 1957 over July, 1956 in passenger traffic.

American's increase for the same period was only 9%.

These figures suggest that there is no longer any basis for the Board's feat that American Airlines would dominate the transcontinental market, and should defer no longer a hearing on the vital need for a third San Francisco-New York nonstop carrier.

-AA-

tb10/3/57

[9031]

[BOE 57]

AMERICAN AIRLINES

Interoffice Correspondence — Date Feb. 11, 1958

To C. Strickler — Attention

From Manager Public Relations - SFOS

Subject EXPEDITED HEARING — Reference

The attached is a proposed memorandum to the San Francisco Bay Area press as to the principal facts indicating the need for a 3rd nonstop carrier between San Francisco and New York, in order to maintain their interest in this matter and to keep them abreast of developments.

T. W. Barbour

[9032]

FROM: AMERICAN AIRLINES
Tom Barbour-Public Relations
1420 Russ Building
San Francisco, California
YUkon 2-4620

MEMO TO EDITORS

The following is a summary of the principal facts indicating the need for a third nonstop air service between San Francisco and New York:

1. The San Francisco-New York air market with 786 passengers per day is the largest market in the United States with only TWO nonstop carriers. This does not include passengers originating or terminating beyond either San Francisco or New York (September 17-30, 1956 Airline Traffic Surveys).

2. The San Francisco-New York air market produces 2,027,327 revenue passenger miles per day, the second highest passenger mile market in the nation and the largest passenger mile market with only TWO nonstop carriers (September 17-30, 1956 Airline Traffic Surveys).

3. There are at least thirty-five air markets in the United States which generate less revenue passengers and revenue passenger miles than the San Francisco-New York market yet receive service from THREE or MORE nonstop carriers (Appendix A-p.1 & 2 San Francisco Answer and Motion May 7, 1957).

4. The capital investment in the San Francisco Airport of every man, woman and child in San Francisco is $93.75, the highest per capita investment in the nation. (Data supplied by H. Messersmith).

5. Expeditious award by the Civil Aeronautics Board of authority to American Airlines to provide a third nonstop service between San Francisco and New York is absolutely necessary if San Francisco is to obtain jet service on a comparable basis with Los Angeles. In this regard Los Angeles, with three nonstop carrier service to New York, received nonstop standard service eighteen (18) months before San Francisco; and, nonstop coach service seventeen (17) months before San Francisco.

6. If San Francisco does not obtain a third nonstop service to New York, it will be many years before the matter is again considered by the Civil Aeronautics Board and San Francisco will continue to lag behind Los Angeles in obtaining comparable jet service just as it did in nonstop service.

7. If San Francisco fails to obtain jet service at a comparable time with Los Angeles, San Francisco will suffer an economic disadvantage which will benefit its leading competitive city for years.

8. At the time San Francisco filed (May 7, 1957) its supporting motion for the expedited hearing now scheduled, San Francisco received seven (7) daily nonstop flights as against nineteen (19) for Los Angeles. One of the main factors for the frequency of service between Los Angeles and New York was competition between the three nonstop carriers.

9. Boston, New York, Philadelphia and Washington, the major East Coast terminals, are authorized to receive nonstop service in their largest transcontinental markets from three carriers, yet San Francisco has for years been saddled with inadequacy of service from TWO carriers.

10. In order to eliminate the present discriminatory, unfair pattern of service San Francisco receives, in comparison to that given Los Angeles and the major East Coast terminals, the Civil Aeronautics Board should immediately authorize nonstop transcontinental service by American Airlines.

-AA-

tb2/12/58

[9034]

Release
6/12/58

[BOE 58]

FROM: AMERICAN AIRLINES
Tom Barbour-Public Relations
1420 Russ Building
San Francisco, California
YUkon 2-4620

FOR IMMEDIATE RELEASE

American Airlines disclosed today that it is prepared to introduce two daily round-trip jet flights, nonstop between San Francisco and New York in December, if its longstanding application for a nonstop route is approved in time by the Civil Aeronautics Board.

American Airlines, which will be several months ahead of other domestic airlines in introducing United States jet service with the Boeing 707, included the proposal in exhibits filed with the CAB in support of the application. The CAB is scheduled to start expedited hearings July 8 on the request.

The airline stated that it expects to increase its volume of service between the two cities to three daily round-trip

-more-

[9035]

nonstops within six months after the start of initial service. American indicated it would offer both First Class and Air Coach accommodations on the jets.

The Boeing 707 cruises at speeds approximating 600 miles per hour. The airline said it would trim the fastest present nonstop schedule virtually in half -- from 8 hours to 4 1/2 hours on eastbound flights, and from 9 hours to 5 1/2 hours westbound.

American announced some months ago that it planned to inaugurate service with the Boeing 707 nonstop between Los Angeles and New York -- now served by three competing carriers -- before the end of the year. At that time, American Airlines indicated it would start similar nonstop service between San Francisco and New York on or about the same date if the nonstop application were approved. Only two airlines now provide nonstop service between San Francisco and New York.

In the exhibits filed today, American Airlines stressed the fact that the Boeing 707 jet will enable the airline to provide a greatly improved level of comfort and luxury in air transportation. In addition to the tremendous savings in time (the fastest piston airliner in the U.S. today cruises at about 365 m.p.h.), American cited other advantages of

-more-

passenger jet flight such as the vibrationless ride and the sound level reduction in the cabin.

The new jets, American Airlines pointed out, also will offer improved cargo service which would be especially attractive to the shippers of perishables such as fruit, vegetables, flowers and similar products which do a heavy volume of business between the two cities.

-AA-

tb6/12/58

[9037]

[BOE 59]

FROM: AMERICAN AIRLINES
Tom Barbour-Public Relations
1420 Russ Building
San Francisco, California
YUkon 2-4620

MEMO TO EDITORS

The following is a summary of the positions of American Airlines and others in the San Francisco-New York Nonstop Case (C.A.B. Docket 9214), which may be of interest to you. The hearing for civic witnesses will be held in San Francisco, now postponed to July 30, with air carrier portion set for Washington, D. C., September 9, 1958.

[9038]

EXHIBITS OF AMERICAN AIRLINES

They state the case in behalf of American Airlines as follows:

AMERICAN PROPOSES TO ELIMINATE THE RESTRICTION REQUIRING ITS NEW YORK-SAN FRANCISCO/OAKLAND FLIGHTS TO STOP AT AN INTERMEDIATE POINT. At the present time, the only carriers certificated to fly from San Francisco to New York nonstop are United Air Lines and Trans World Airlines. American Airlines is required to stop at either Chicago, Dallas, or Tulsa.

AMERICAN AIRLINES JET SERVICE

AMERICAN AIRLINES PROPOSES TWO ROUND-TRIP NONSTOP TRANSCONTINENTAL JET FLIGHTS

FROM NEW YORK TO SAN FRANCISCO, EFFECTIVE ON OR ABOUT THE SAME TIME AS SUCH SERVICE IS INAUGURATED AT LOS ANGELES AND NOT LATER THAN DECEMBER 1, 1958, IF NONSTOP AUTHORITY BECOMES EFFECTIVE. This service will be provided with Boeing 707 equipment with dual configuration (coach and first class).

Eastbound, American proposes two roundtrip nonstop transcontinental flights daily as follows:-

Lv. SAN FRANCISCO	9:00 a.m.
Ar. NEW YORK	4:30 p.m.
Lv. SAN FRANCISCO	1:30 p.m.
Ar. NEW YORK	9:00 p.m.

Effective date on or about the same time such service is inaugurated at Los Angeles and not later than December 1, 1958.

A third roundtrip nonstop transcontinental flight daily, effective July 1, 1959 or before is proposed as follows:-

Lv. SAN FRANCISCO	11:30 p.m.
Ar. NEW YORK	7:00 a.m.

Equipment - Boeing 707

Westbound, we propose the following schedule:

Lv. NEW YORK	9:00 a.m.
Ar. SAN FRANCISCO	11:30 a.m.
Lv. NEW YORK	6:30 p.m.
Ar. SAN FRANCISCO	9:00 p.m.

Effective on or before July 1, 1959, American Airlines proposes a third nonstop schedule:

Lv. NEW YORK 12:30 p.m.
Ar. SAN FRANCISCO 3:00 p.m.

Equipment - Boeing 707 dual configuration (first class and air coach).

[9040]

NO PASSENGER FARE INCREASES ARE CONTEMPLATED PURELY ON THE BASIS OF THE INTRODUCTION OF JET SERVICE.

Passenger fares and airfreight tariffs are set by the CAB. All major airlines, however, are presently participating in the CAB general passenger fare investigation, hoping for a fare increase adequate to their needs and which they say is long overdue.

DIVERSION OF TRAFFIC FROM TWO AND UNITED American's exhibit estimates that after considering participation of these carriers in the San Francisco-New York market prior to introduction of nonstop service and after introduction of the proposed nonstop service during calendar year 1959, that out of a total nonstop market potential of 989,870,659 passenger miles, TWA will lose only 649,632 passenger miles, and United 938,709 passenger miles. It should be noted that American estimates that the introduction of jet service, plus actual need for additional service will stimulate new travel in the amount of 197,974,132 passenger miles.

[9041]

AMERICAN STANDS TO LOSE MORE IF ITS NEW YORK-SAN FRANCISCO/OAKLAND RESTRICTION IS NOT REMOVED THAN EITHER TWA OR UNITED COULD LOSE IF AMERICAN'S RESTRICTION IS REMOVED.

American's Exhibit AA 15 is based on relative participation figures for the calendar year 1957, and assumes the New York nonstop market will be split three ways. It further assumes NO increase in traffic after inroduction of jet services, and that the market was NOT underdeveloped during 1957. It states that the maximum passenger mile diversion of United and TWA in accordance with the relative participation would be nearly 53 million passenger miles diverted from TWA and 66 million passenger miles diverted from United Air Lines. If American's restriction is not lifted, American stands to lose just about all of its present 93 million passenger mile participation in the market.

[9042]

SUBSTANTIAL INCREASES IN TRAFFIC ARE ASSOCIATED WITH SUBSTANTIAL INCREASES IN SPEED. American Airlines estimates that traffic stimulation, associated with an increase of speed (707 over the DC-7) of 32.1% will stimulate traffic by 37.8%. As an example, a 20% increase in speed in the segment between Boston and Miami led to a traffic increase of 314.8%.

[9043]

EXPERIENCE WITH THE DC-7 INDICATES THAT PASSENGERS ARE ATTRACTED TO IMPROVED NONSTOP SERVICES. American's exhibit states that solely as a result of the introduction of DC-7 nonstop services, standard fare passengers increased at least 27.1%.

AMERICAN'S NONSTOP JET SERVICE WILL INCREASE NEW YORK-BAY AREA SPEEDS BY ALMOST 70%, FAR MORE THAN ANY INCREASE IN THE PAST. Thus, the increase in speed from the DC-3 to DC-4 was 29.3%; from the DC-4 to DC-6, 16.5%; from the DC-6 to DC-7, 22.7%; and from the DC-7 to Boeing 707, 40.9%. American's nonstop jet service will increase New York-Bay Area speeds far more than any service improvement in the past (69.9% increase in block speed). American expects to average 470.3 miles an hour westbound, and 574.8 miles an hour, eastbound, in "block time." "Block time is the elapsed time from "taxi out" to "cut engines.")

EVOLUTION OF TRANSCONTINENTAL AIRCRAFT. The Boeing 707 will be twice as heavy (this means more revenue to the city), will have larger wing area, will be longer, and will have a fatter fuselage than the DC-7. The advance from the DC-7 to the Boeing 707 is a greater step in air transportation by a tremendous amount than any ever taken before.

THE JET ENGINE. The jet engine itself brings with it major advances: Speed can be increased without increases

[9044]

in engine weight and drag due to frontal area; pound per pound, the jet engine produces more power than the piston engine. The jet makes its efficiency as speed and altitude increase. It is a simpler, safer, more easily maintained engine and all the advances it contributes will not increase the cost per seat mile.

NEW CONCEPT OF SPEED. The jet airplane vastly increases the distance covered in the same elapsed time (compared to other airplanes). The 707 is "the giant step" in the whole history of speed development. The incremental speed realized by the 707 over the best piston aircraft is perhaps three times that enjoyed heretofore. (DC-7 over DC-6). The 707 provides a greater incremental increase in speed, in one airplane, than was produced in the evolutionary period from the DC-3 to the DC-7.

NEW STANDARDS OF PASSENGER COMFORT. Jet aircraft will offer a marked improvement in comfort as a result of their low noise and vibration; the flight is smoother because pitching motion is substantially reduced, the airplane will cruise 10,000 ft. higher than the average for piston airplanes (the air is less turbulent), and the 707 enjoys "gust-relieving" characteristics due to the limber Boeing wing. The Boeing 707 can maintain sea-level cabin pressure at 22,700, and the Boeing air conditioning unit is five times better in rating than that of the DC-7. Ventilation throughout the airplane will be nearly twice as good as the DC-7.

[9045]

AMERICAN AIRLINES PREPARATIONS FOR JET SERVICE. American Airlines will spend some $35,000,000 on the ground in its preparations for jet service. American will be the sole tenant (except for a small corner occupied by Pacific Air Lines) of San

Francisco's new Concourse E. Through special facilities such as the moveable nose loading bridge and spacious and comfortable departure rooms, passenger convenience will be greatly improved at San Francisco. At New York International Airport, Idlewild, American has begun construction of a complete new terminal, consisting of a main building and two consourses.

Additional speed and ease in loading and unloading cargo compartment of the Boeing 707 will be permitted by the preloaded baggage containers. It is anticipated that baggage for one hundred passengers or more can be off-loaded from a Boeing 707 in 6 minutes.

Improved ground installations will be established at several other major airports around the country.

JET SERVICE TO BE PROVIDED IF AMERICAN'S RESTRICTION IS NOT REMOVED. To complete the record and to answer the obvious question - what American will do if the restriction is not lifted - American's exhibit states that even if still handicapped with it's restriction, it will begin service at some date during 1959 (unofficial presumption is January 1, 1959) as follows:

[9046]

9:00 a.m.	7:00 p.m.	Lv. NEW YORK	Ar. 4:50 p.m.	10:50 p.m.
9:50 a.m.	7:50 p.m.	Ar. CHICAGO	Lv. 2:20 p.m.	8:20 p.m.
10:20 a.m.	8:20 p.m.	Lv. CHICAGO	Ar. 1:50 p.m.	7:50 p.m.
12:20 p.m.	10:20 p.m.	Ar. SAN FRANCISCO	Lv. 8:30 a.m.	2:30 p.m.

This service, which would be in addition to Chicago-San Francisco/Oakland and New York-Chicago turbo-jet or turbo-prop service, would be operated to provide the first jet service for New York-San Francisco/Oakland traffic. Continuation of the service would depend on the volume of nonstop jet service provided by TWA and United.

ALTHOUGH HAMPERED BY ROUTE RESTRICTIONS, AMERICAN HAS OFTEN BEEN FIRST AT SAN FRANCISCO/OAKLAND WITH MAJOR NEW SERVICES. For instance: First all-pressurized service (nearly 7 years before United and almost 10 years before TWA); first DC-7 service or equivalent (6 months ahead of United and a year-and-a-half before TWA); first DC-6A all-cargo service by airlines also carrying passengers (2 1/2 months before United).

AMERICAN'S PARTICIPATION IN NEW YORK-SAN FRANCISCO/OAKLAND TRAFFIC EXCEEDS THAT OF OTHER CARRIERS IN LEADING NEW YORK MARKETS WHERE ROUTE RESTRICTIONS WERE RECENTLY REMOVED. For instance: New York-Tampa, New York-Louisville, New York-Seattle.

THE COMPETITIVE BURDEN IMPOSED BY THE NEW YORK-BAY AREA ROUTE RESTRICTION IS SHOWN BY AMERICAN'S DECLINING PARTICIPATION IN THE TRAFFIC AFTER NONSTOP SERVICE WAS INAUGURATED.

[9047]

Since April of 1954, when another carrier instituted nonstop service, American's one-stop participation in the market has dropped to around 10%.

THE COMPULSORY-STOP SERVICE OF 10 YEARS AGO IS INADEQUATE FOR THE JET AGE.

a. Nonstop service has been extended greatly since 1949 in 97% of the nation's long haul markets.

b. Virtually all traffic in leading markets now moves on carriers providing nonstop service (88% of the passenger miles, out of 40 leading city pairs now moves on carriers providing nonstop service).

In other words, if you don't have a nonstop, you're not in the market anymore. This will be most true in the future and American's New York-Bay Area one-stop authority will be completely inadequate in the jet age.

THE NEW YORK-SAN FRANCISCO/OAKLAND MARKET IS ONE OF THE NATION'S LARGEST MARKETS IN PASSENGER MILES. For the past five years, it has consistently ranked third in the nation. In total passengers during the past five years, this segment has averaged 12th in the nation. In total passengers for markets over 500 miles apart, the San Francisco-New York segment has ranked 6th for the past 5 years.

[9048]

ONLY 4 MARKETS IN THE NATION GENERAGE OVER A HALF-BILLION PASSENGER MILES ANNUALLY AND ALL HAVE THREE OR MORE NONSTOP CARRIERS EXCEPT NEW YORK-SAN FRANCISCO/OAKLAND. New York-Miami generates a billion passenger miles a year, Los Angeles-New York nearly a billion passenger miles a year. In third place is New York-San Francisco/Oakland with nearly 643 million passenger miles a year. In fourth place is Chicago-New York with a little better than one-half billion passenger miles.

THERE ARE ONLY SIX LONG HAUL MARKETS THAT EXCHANGE ONE-QUARTER MILLION PASSENGERS AND EACH HAS THREE NONSTOP CARRIERS EXCEPT NEW YORK-SAN FRANCISCO/OAKLAND. Chicago-Los Angeles has 4 nonstop carriers but generates less traffic than the segment New York-San Francisco/Oakland. Detroit-New York has 5 nonstop carriers but is only slightly busier as a segment than New York-San Francisco/Oakland.

THE NEW YORK-SAN FRANCISCO/OAKLAND MARKET IS THE ONLY LEADING PASSENGER MILE MARKET WITH JUST TWO NONSTOP CARRIERS. Of the 10 leading passenger mile markets:

Miami-New York has 3 nonstop carriers
Los Angeles-New York has 3 nonstop carriers
San Francisco-New York has 2 nonstop carriers
Chicago-New York has 5 nonstop carriers
Chicago-Miami has 3 nonstop carriers
Chicago-Los Angeles has 4 nonstop carriers

and so on, in declining rank.

[9049]

EVERY ONE OF THE 10 LEADING PASSENGER MILE MARKETS WITH ONLY 2 NONSTOP CARRIERS PRIOR TO SEPTEMBER 1955 NOW HAS 3 NONSTOP CARRIERS EXCEPT NEW YORK-SAN FRANCISCO/ OAKLAND.

In other words, it's about time the CAB took care of San Francisco.

THE NEW YORK-SAN FRANCISCO/OAKLAND MARKET HAS ONLY 2 NONSTOP CARRIERS, WHILE MANY SMALLER PASSENGER MARKETS HAVE 3 OR MORE NONSTOP CARRIERS. Such segments as Chicago-Los Angeles, Chicago-Washington, New York-St. Louis, Chicago-Philadelphia, Miami-Philadelphia, Chicago-San Francisco/Oakland, Boston-Miami, Atlanta-New York, and so on down the line, to Chicago-Denver (1/6 the number of passengers as San Francisco-New York) all have more than 2 nonstop carriers.

ALTHOUGH NEW YORK-SAN FRANCISCO/OAKLAND STILL HAS ONLY 2 NONSTOP CARRIERS, MANY SMALLER MARKETS HAVE BEEN AUTHORIZED 3 NONSTOP CARRIERS SINCE SEPTEMBER 1, 1955. These include Chicago-Miami, Chicago-San Francisco, Boston-Miami, Miami-Philadelphia, Cleveland-New York, New York-St. Louis, and on down in declining rank to Baltimore-Miami. Atlanta-Miami, a dinky segment by any standard, has 5 nonstop carriers, 3 of them added since September 1955.

SAN FRANCISCO/OAKLAND IS NEW YORK'S MOST IMPORTANT MARKET WITH ONLY 2 NONSTOP CARRIERS. Miami is New York's biggest market, Los Angeles is next, and San Francisco is 3rd. Chicago is in 4th position. Both

Chicago and Detroit have more carriers but less business. Chicago and Detroit which have less business with New York are served by 5 nonstop carriers from New York (in some cases subject to long haul restrictions).

NEW YORK IS SAN FRANCISCO/OAKLAND'S LEADING PASSENGER MILE MARKET AND MOST IMPORTANT LONG HAUL PASSENGER MARKET.

New York accounts for 1/4 of all passenger miles generated by San Francisco/Oakland.

New York is San Francisco/Oakland's most important market with only 2 nonstop carriers.

By any standard, New York and San Francisco are two of the nation's largest, most important most prosperous cities. They are served by only two nonstop carriers, one of which totally dominates San Francisco and the San Francisco Bay Area (United), and another which provides little strenuous competition (TWA). Obviously, the situation must be remedied for the benefit of the communities and the travelling public.

SAN FRANCISCO/OAKLAND GENERATES MORE TRAFFIC PER CAPITA THAN ANY OF THE 15 LEADING POPULATION CENTERS. Therefore, San Francisco Bay Area citizens deserve better, more competitive service and have earned a wider selection of carriers than any other city in the nation. Yet the San Francisco Bay Area has, in many cases, less choice than other cities which use air transportation less. San Francisco/Oakland generates 1,031.4 passenger miles per capita annually. San Francisco/Oakland generates 952.1 air passengers per one thousand

[9051]

population. Next best city is Washington/Baltimore with 933.2.

SAN FRANCISCO/OAKLAND GENERATES MORE TRAFFIC PER CAPITA THAN OTHER LEADING POPULATION CENTERS ON THE EAST AND WEST COASTS WHICH HAVE TRANSCONTINENTAL NONSTOP SERVICE. San Francisco is way ahead of Los Angeles in passenger miles per capita and slightly ahead in air passengers per one thousand population.

HISTORICALLY, EXPRESS SERVICE IN THE NEW YORK-SAN FRANCISCO/OAKLAND MARKET HAS BEEN INFERIOR TO THAT IN THE NEW YORK-LOS ANGELES MARKET. This has been true in: one-stop flights per one hundred passengers; in nonstop flights per one hundred passengers; in nonstop seats per one hundred passengers; and in nonstop coach service.

THE TRAFFIC DEVELOPMENT OF NEW YORK-SAN FRANCISCO/OAKLAND HAS FALLEN BEHIND NEW YORK-LOS ANGELES DURING THE PAST 5 YEARS.

SERVICE IN THE NEW YORK-SAN FRANCISCO/OAKLAND MARKET DETERIORATED SHARPLY AFTER THE DECISION IN THE DENVER SERVICE CASE. (The last case in which this issue was considered). This occurred in nonstop schedules (as compared to Los Angeles and the decline has run from 42.9% to 25.9% of Los Angeles service). In other words, after the pressure was off, the service deteriorated, for lack of competition.

BY MID 1957, THE RATE OF GROWTH OF THE NEW YORK-SAN FRANCISCO/OAKLAND MARKET HAD FALLEN ONE FULL YEAR BEHIND THAT OF NEW YORK-LOS ANGELES MARKET. This statement is based on an index of passenger growth in which the fiscal year 1953 is given the rating of one hundred.

AVERAGE DAILY NONSTOP SEATS SCHEDULED BETWEEN NEW YORK AND SAN FRANCISCO/OAKLAND SINCE THE DECISION IN THE DENVER SERVICE CASE RANGED FROM 300 TO 400 DURING 1955, 1956, AND UNTIL MAY 1957. When American Airlines submitted its motion to expedite hearing on the need for nonstop service, the number of seats suddenly zoomed from about 300 to more than 900. This is called "11th hour" service -- to glut the market with vastly increased service and thus attempt to stave off new competition.

NEW YORK-SAN FRANCISCO/OAKLAND NONSTOP SERVICE HAS ALWAYS FALLEN WELL BELOW THE NEW YORK-LOS ANGELES LEVEL. Even with all the "11th hour" service by TWA and United, San Francisco failed to come up to the level of Los Angeles.

BY A WIDE MARGIN, NEW YORK HAS HISTORICALLY BEEN THE LEADING AIRFREIGHT MARKET FOR SAN FRANCISCO/OAKLAND. (372,034 revenue ton miles to New York as compared to 189,033 to Chicago).

TONS OF AIRFREIGHT EMPLANED AT SAN FRANCISCO/OAKLAND HAVE INCREASED 81% IN THE PAST FIVE YEARS.

[9053]

AMERICAN AIRLINES IS THE LEADER OF THE AIRFREIGHT INDUSTRY BY A WIDE MARGIN.

AMERICAN AIRLINES' PROPOSED JET SCHEDULE WILL PROVIDE THE FASTEST OVERNIGHT SERVICE FROM SAN FRANCISCO/OAKLAND TO NEW YORK IN CARGO SERVICES. Thus, American's early introduction of jet service at San Francisco will provide a major improvement for Bay Area airfreight users.

AMERICAN AIRLINES IS THE LEADER IN DEFERRED AIRFREIGHT. Deferred airfreight is airfreight on which the shipper enjoys a lower rate, accepts a 2-day delay, but gets his cargo to destination faster than any other way except direct airfreight. Such airfreight helps to keep the cargo planes full. It also makes air service available to a greater portion of the general public than any other type of air cargo service.

AS FOR NORTHWEST'S APPLICATION IN THIS CASE: WHILE AMERICAN PROPOSES THE ELIMINATION OF A ROUTE RESTRICTION IMPEDING SERVICES AT THE CITY IT HAS SERVED FOR OVER 10 YEARS, NORTHWEST SEEKS A WHOLLY NEW TRANSCONTINENTAL ROUTE AT A CITY IT HAS NEVER SERVED.

AMERICAN HAS HAD A SUBSTANTIAL PARTICIPATION IN NEW YORK-SAN FRANCISCO/OAKLAND TRAFFIC DURING THE PAST YEARS, NORTHWEST VIRTUALLY NONE.

[9054]

TRANS WORLD AND UNITED DOMINATE SAN FRANCISCO/OAKLAND'S LONG HAUL MARKETS.

It has been stated by the CAB as the sole basis for denying American's earlier petitions to provide transcontinental nonstop service from San Francisco, that American would "dominate the market." This, however, is already true of Trans World and United. For segments over 1,000 miles, TWA and United have around five times the nonstop potential of American and three times the access to long haul markets. Both TWA and United have far greater nonstop access and nonstop potential in long haul markets than does American.

BOTH TWA AND UNITED HAVE CONSIDERABLY GREATER NONSTOP MARKET ACCESS AND CONSIDERABLY FEWER NONSTOP COMPETITORS THAN DOES AMERICAN IN EACH CARRIER'S LEADING PASSENGER MILE MARKETS. Although American Airlines admittedly is America's leading air transportation system, American's participation in the overall national market has been declining rapidly since early 1956 when many competitors were granted access to American's markets, whereas American has enjoyed few similar benefits in the way of comparable new route awards. American's growth lags well behind United and TWA's.

[9055]

UNITED AIR LINES' EXHIBITS

The following extracts are from the public record (United Air Lines' and Trans World Airlines' exhibits).

JET SERVICE

United proposes to service San Francisco with DC-8 jet aircraft starting September 1, 1959, with one nonstop roundtrip per day.

On November 1, 1959: One nonstop roundtrip and one one-stop roundtrip.

December 1, 1959: Two nonstop roundtrips, one one-stop roundtrip.

April 1, 1960: Three nonstop roundtrips, one one-stop roundtrip.

By the summer of 1961: Four nonstop roundtrips per day.

This compares with American's firm proposal to fly this route nine months sooner and with two nonstop flights per day, followed by a third nonstop within six months. United proposes mixed first class and coach seating ranging

[9056]

from 118 to 141 seats depending on the interior configuration most practical.

As for the acquisition of turbine aircraft, United says it will receive one airplane in April, 1959, another in May and a third in June. Three of the initial aircraft are specified for engineering and training purposes only. They will be returned to Douglas for certification and redelivery to United in March and April of 1960. The first United DC-8 delivered for service will come in August of 1959. Thereafter, until the end of 1959 United says that it expects to have seven jet airplanes in service. During 1960 it will receive new airplanes at the rate of a little better than two a month.

United estimates on Page 1 of Exhibit U-11 that the DC-8 will have 258.4 times the productivity in available seat miles of the DC-7. United further estimates that during 1961 the average "block" speed of the DC-8 will be 428 miles an hour, utilization - 9 hours per day, average seating capacity - 122 persons, and payload capacity - 16.1 tons. United estimates that it will spend $431,237,000 total on capital expenditures covering its jet program, including aircraft and spares.

In its exhibit, United makes a thorough case for its contention that load factors will be severely reduced by the entry of a third carrier into the market and by the

[9057]

introduction of jet service. Historically, however, such contentions are never borne out by experience, because as more service is provided, more passengers are generated. Directly in point is United's graph, Page 1, Exhibit U 37. This shows what happened when, following American's petition for expedited action on its nonstop application, United and TWA increased nonstop flights from 5 to 14. By the time of the introduction of the 14th flight, the load factor was precisely the same as it was before all the new "eleventh hour" service was introduced. Subsequently, however, load factors did decline but were well above the break-even point and at the end of the period shown, the load factor was a healthy 60%. At the time American introduced its motion for expedited hearing, United was enjoying a fantastic 79% load factor on its nonstop flights.

United's Exhibit U 39 states that total passengers between 1950 and 1957 increased 263% between San Francisco and New York, whereas total passengers between Los Angeles and New York increased by only 231%. Also, on Page 1 of Exhibit U 52, United points out that the Los Angeles metropolitan area has increased in population 62.5% in the last 11 years whereas San Francisco/Oakland has increased only 25.4%. Bay Area citizens are greater users of air transportation and this is proved in the City of San Francisco's exhibit No. 11. On Page 1 of Exhibit U 61, United points out that it makes a big contribution to the economy of the San Francisco Bay Area. Every one should appreciate this, but it has little application to the need for additional nonstop service to New York. More competition will reduce the dependence of the community on one carrier (United) as is the case here. Both United and TWA have failed to summarize the daily load factor data requested by CAB Bureau Counsel - instead, it has supplied the information in detail. This, no doubt, contributed to the desired effect: Postponement of the hearing from July 8 to July 30, and further delay in bringing this case to the conclusion desired by the City.

[9059]

TRANS WORLD AIRLINES EXHIBIT

Trans World Airlines points out that the San Francisco metropolitan area is growing at a slower rate than Los Angeles; that the comparative size and importance of San Francisco in per cent of total state metropolitan population is declining, (in other words, it isn't growing as fast as other places), and that San Francisco does not have the size or importance of Los Angeles. This is supposed to prove that San Francisco doesn't need as much service as Los Angeles.

The obvious fallacy in such a comparison is that the mileage area of the two metropolitan districts are not comparable and therefore meaningless. The metropolitan area of San Francisco for example does not include much of the surrounding sublying areas where a large part of the growth has accrued that depends on the Bay Area airport for its air commerce.

One set of statistics points out that San Francisco in 1949 had 87.7% as many air passengers as Los Angeles,

[9060]

and that now San Francisco only has 73.5% as many air passengers as Los Angeles. This, again, is supposed to indicate we do not need the same amount of nonstop air service as Los Angeles. However, these same figures clearly indicate that Los Angeles had 3 nonstop carriers at a point when its total air passengers were less than the number now generated at San Francisco. Maybe, if San Francisco had more nonstop service, San Francisco would have more nonstop passengers. In all, TWA devotes perhaps one-half of its exhibit to proving that San Francisco doesn't need air service as much as Los Angeles.

JET SERVICE

As for indication of jet aircraft service between San Francisco and New York, TWA states that it will serve this market with one flight a day beginning February 1, 1959, a second on February 15, 1959 and a third after April 15, 1959. TWA is purchasing Boeing 707's and estimates the interior configuration will accommodate 120 passengers, mixed first class and coach.

This suggests that TWA will put all of their first jets in only the San Francisco - New York market. Suddenly this market gets all of TWA's attention whereas in the past it has received very little. What of TWA's Los Angeles - New York, Chicago - New York area and their overseas markets -- don't they rate even one of TWA's early jets?

[9061]

As did United, TWA has submitted daily load factor data in extended rather than in summary form. This requires further tabulation and again, no doubt, contributed to the delay of the case requested by CAB Bureau Counsel.

Both TWA and United, in their exhibits, failed to answer the Board's direct request that they state what the effect would be of jets on the long-haul San Francisco - New York market. American and Northwest did provide this material.

-AA-

tb7/14/58

[9062]

[BOE 60]

FROM: AMERICAN AIRLINES
Tom Barbour-Public Relations
1420 Russ Building
San Francisco, California
YUkon 2-4620

MEMO TO EDITORS

The San Francisco-New York Nonstop Case (Docket 9214 et al) resumes before a Civil Aeronautics Board Examiner in Washington, D. C. on September 9th, at 10 a.m. in Room E-224, Temporary Building No. 5, Sixteenth Street and Constitution Avenue. Since this case is extremely important to the future of San Francisco as an aerial port city, the following information is to assist your coverage.

EXAMINER: Walter W. Bryan

PARTIES TO BE HEARD: Airlines (as distinguished from municipalities), except that since the Port of New York Authority was not heard in San Francisco last July 30th,

[9063]

PYNA is expected to make its presentation in Washington. Also, at the request of the Examiner, the City of San Francisco will submit two additional exhibits:

(a) The results of a survey conducted by the City to determine the actual availability of nonstop space to New York, and

(b) A report on how the money from the City's $25,000,000 "jet age" bond money is being spent.

SCHEDULE OF WITNESSES:

1. City of San Francisco - (Mr. Harold Messersmith, Manager of Operations, San Francisco International Airport)
2. Port of New York Authority - (Probably Mr. Neal Lynch)
3. American Airlines - (Mr. Marvin Whitlock, Vice President, Engineering; Mr. Charles R. Speers, Senior Vice President, Sales, and four others).
4. Northwest Orient Airlines.
5. Trans World Airlines.
6. United Air Lines.
7. Civil Aeronautics Board Bureau Counsel

Length of the Washington portion of the hearing: 10 days to two weeks.

[9064]

CHRONOLOGY OF THIS ISSUE:

December 1955	-	CAB, in Denver Service Case, denies San Francisco a third nonstop carrier, on sole grounds such an award to American Airlines would allow that carrier to "dominate the market," and with no reference to public need found earlier by CAB examiner Ferdinand Moran, and by the counsel for the CAB Bureau of Air Operations who recommended a third nonstop carrier, also in the Denver Service Case.
May 1957	-	City of San Francisco and American Airlines' move for expedited hearing.
June 1957	-	CAB denies motion but asks staff to make a study.

January 1958 - CAB, after considering the study, directed that an expedited hearing be held on the sole issue of the need for an additional nonstop San Francisco-New York carrier.

April 1958 - CAB denies petitions for reconsideration by United and TWA, seeking to block the hearing.

April 29, 1958 - Prehearing conference held in Washington, D.C. and the hearing set for July 8, 1958.

June 1958 - At request of United and TWA, hearing is delayed to July 30 for civic presentations. CAB declines to act on protests from City of San Francisco and American Airlines.

July 30, 1958 - Civic witnesses heard in San Francisco; San Francisco's case presented by Dion Holm, City Attorney of San Francisco.

CONTENDING PARTIES:

The cities of New York, San Francisco, and Oakland, supported by a score of other cities and towns throughout Northern California; the San Francisco and Oakland Chambers of Commerce; the San Francisco Down Town Association; American Airlines; and Northwest Orient Airlines, all urging additional service.

versus

United Air Lines and Trans World Airlines, opposing on the grounds that the service they provide is adequate.

THE ISSUE: Whether or not the public convenience and necessity require that an additional carrier be certificated to provide nonstop service between New York/Newark and San Francisco/Oakland.

OTHER CONSIDERATIONS: The first introduction of jet aircraft on transcontinental airline routes by American Airlines, which has ordered more new turbine equipment than any other airline in the world, plus American Airlines' consistent record of leadership in the field of air transportation; San Francisco's concern because historically it has lagged behind its competitor city, Los Angeles, in total pattern of domestic air service; the monolithic dominance of San Francisco's air commerce by United Air Lines; the fact that this may be San Francisco's last chance in many years to get an improvement in its service to New York; the enormous promise of the jet airplane.

[9066]

THE CASE FOR ADDITIONAL SERVICE:

The San Francisco-New York market is the nation's leading air travel market with only two nonstop carriers.

New York is San Francisco's most important passenger-mile market.

New York is San Francisco's most important long haul passenger market.

San Francisco is New York's most important passenger mile market with only two nonstop carriers.

The San Francisco-New York nonstop route structure is inferior. Practically every other important city-pair in the country, many of them inferior to the New York-San Francisco market, has three or more nonstop carriers.

Nearly six million persons in Northern California will be benefited if new transcontinental nonstop service is added.

Jet nonstop service between San Francisco and New York offers the greatest improvement in the history of air service over this segment.

Service in the San Francisco-New York market has lagged historically behind service in the Los Angeles-New York market.

Service between San Francisco and New York has historically been inferior to that between Los Angeles and New York, in:

Nonstop flights per hundred passengers
Nonstop seats per hundred passengers
Nonstop coach seats per hundred coach passengers
Los Angeles enjoys a better ratio of total service to total traffic than does San Francisco in this market.

Traffic development between San Francisco-New York has not kept pace with Los Angeles-New York

When American filed its motion in this case, TWA and United increased nonstop New York service from eight to fourteen flights, but even with this "eleventh hour" increase, San Francisco's pattern of service was still inferior to Los Angeles.

TWA has not provided effective competition to United in this market.

United dominates San Francisco air traffic (60 per cent of domestic trunkline flights and 59 per cent of total trunkline traffic).

No single carrier dominates Los Angeles as United does San Francisco.

Every San Francisco taxpayer has an investment of at least fifty dollars in the physical plant at San Francisco airport, and has the right to the best available service.

The San Francisco taxpayers voted an additional $25,000,000 for airport improvements to prepare for jet aircraft, and they should not be denied the finest available jet service at the earliest date.

San Francisco International Airport will be prepared for the jet age. Its improvement program is well advanced.

AMERICAN AIRLINES' CASE:

Petition: American requests elimination of the restriction that requires its San Francisco-New York flights to stop at an intermediate point (Chicago).

Proposal: American proposes at least two round trip nonstop transcontinental jet flights per day between San Francisco and New York starting in January 1959:

Eastbound

Lv. San Francisco	9 a.m.	Ar. New York	4:30 p.m.
Lv. San Francisco	1:30 p.m.	Ar. New York	9 p.m.

Westbound

Lv. New York	9 a.m.	Ar. San Francisco	1:30 a.m.
Lv. New York	6:30 p.m.	Ar. San Francisco	9 p.m.

And, starting before July 1, 1959, a third flight:

Lv. San Francisco	11:30 p.m.	Ar. New York	7 p.m.
Lv. New York	12:30 p.m.	Ar. San Francisco	3 p.m.

Equipment: Boeing 707 Jetliners, dual configuration (first class and aircoach).

[9068]

Proposal in case nonstop service not authorized prior to availability of jet aircraft:

Two round-trip flights a day, one-stop to New York, via Chicago.

Continuation of this one-stop service after TWA and United start nonstop service would be contingent on the nonstop volume provided by UAL and TWA.

Other Arguments:

An additional carrier in this market will NOT divert as much traffic as TWA and United claim (less than a million and a half passenger miles out of a total market of 989 millions).

American stands to lose more if the restriction is NOT removed than TWA or United will lose if it IS removed.

Whenever you increase the speed, you increase the traffic. The jet plane will bring with it, it's own new traffic, because of the speed factor alone.

Passengers are attracted to improved nonstop services, as will be the case with better service by American Airlines, and better service with jets. Jet planes will be popular, because they are quiet, vibrationless, stable, roomier, have better air conditioning, wider seats, nicer rest rooms, and are truly "the giant step" in air transportation. Jets will be safer, easier to maintain, will fly higher over the weather, will provide better on-time performance, few maintenance delays, and their speed will relieve the tedium of travel because no flight will be longer than five and a half hours.

American Airlines has served San Francisco for eleven years; and has provided the city with its first all-pressurized service; first DC-7 service and, among airlines carrying both passengers and freight, the first DC-6A all-cargo service.

American Airlines has been barred effectively from the New York market by TWA and United nonstops, even though American was first to serve the market with the DC-7. Nonstop service in leading markets has been extended since 1949 in 97 percent of the nation's long-haul markets. 88 percent of the traffic between 40 leading city pairs now flows over nonstop carriers.

The San Francisco-New York market is the only leading passenger mile market with just two nonstop carriers.

Only four markets in the nation generate over a half-billion passenger miles annually. Three of them have at least three nonstop carriers. The exception is San Francisco.

-AA-

tb9/5/58

[9069]
Mag-
[illegible]

DCN
WSJ
TV [illegible]
[illegible]

Time [BOE 61]
[illegible]
NYT
[illegible]
[illegible]

FROM: AMERICAN AIRLINES
Tom Barbour-Public Relations
1420 Russ Building
San Francisco, California
YUkon 2-4620

SM Times
RWC
Bur A

Sent 4/20.

FOR IMMEDIATE RELEASE

Advent of the jet age and the air traffic demands of the San Francisco Bay Area-New York route require nonstop service by American Airlines, the airline stated today in a brief filed with the Civil Aeronautics Board.

Filing of briefs today in the New York-San Francisco Nonstop Case comprised the final step before the full CAB hears oral argument in Washington on April 29. American, which now must make a mandatory stop enroute on its flights between New York and San Francisco, has been recommended by CAB Examiner Water W. Bryan for nonstop authorization. The Board's Bureau of Air Operations also urged that American be allowed to operate nonstop. Both TWO and United Air Lines, which have nonstop privileges between the two cities, oppose American's application.

American declared that the development of air travel over the San Francisco-New York route had lagged behind that of Los Angeles-New York due to inadequacies in service, and the fact that its own service was hampered by the restriction preventing nonstop flights. The brief said:

"The Bay Area has been compelled to wait for improvement in its New York service until the needs of its rival city have been met. Fot it is at Los Angeles that the competitive pressure has been the greater and where the service improvements which are the chief fruits of competition always have been provided first."

Nonstop jet service will bring about dramatic changes in the San Francisco Bay Area-New York air travel, American's brief added. The Boeing 707 cruises at 580 miles an hour compared to the 360 miles per hour for a DC-7. Jet speed will cut the 8 hours it now takes for an eastbound DC-7 nonstop flight to 4 hours 45 minutes; westbound the flight will be reduced from 9 hours to 5 hours 45 minutes.

American said the nonstop jet flights will stimulate both business and pleasure travel on the route and result in increased airfreight shipments. It noted that a businessman, using jets, could complete a full day in New York, depart at 6:30 p.m. and arrive home in San Francisco at 9:15 p.m.

The brief said that air transportation between San Francisco and New York is vital to both cities and merits the benefits of three-carrier competition. New York is San Francisco's leading passenger-mile market and its most important long-haul passenger market. San

Francisco is particularly dependent upon air transportation, generating 952.1 passengers per 1000 population, higher than any other population center.

Unless American's restriction is removed it will be eliminated from the San Francisco-New York market, the brief pointed out. "The public will associate jet speeds with nonstop service almost automatically and will be even more reluctant to accept one-stop service than it is today."

With only two carriers operating nonstop service, American declared, the San Francisco-New York route has not been provided with adequate air service for either first class or coach passengers. It said that the argument made by TWA and United that the market would not support three nonstop carriers was unfounded. The CAB Examiner found that the Bay Area-New York route "will be among the top in future traffic growth," the brief added.

-AA-

tb4/20/59

[9072]

[BOE 62]

October 7, 19
[year illegible]

Karl [illegible] - NYCP

Reg. Dir. Pub. Rel. - LAXS

I was pleased with the 707 pre-inauguration plans which Bud Sutherland presented here and the thought that went into them. I particularly like the LAX public relations plans which called for the 4 p.m. to midnight press flight to Arizona. There should be no thought of cutting these down to two, as this would dilute our effective spread of coverings. After all, the fact that we will take wives will cut down the number of press, radio and TV people to about 150 for the three flights and this is not even the full coverage I would like in this great area.

Frank Burg, Bud Hess and I agree that it would be quite useless to have a family day on a weekday, such as planned for Wednesday, Dec. 17, in LAX and Thursday, Dec. 18, in SFO. We feel that Sunday is the only day which would reach a predominant number of AA employees and their families. Obviously, this is because of weekday schedules and school hours. If possible, we propose that the schedule be moved up one day to Sunday, Dec. 14 so the airplane could fly down from SEA to SFO in the morning for several hours display up to about 2 p.m., then go on to LAX for employee display from about 3 to 6 or 7 p.m. We do not feel that any flights are necesssry for employees at this time because they would dilute the walk through - inspection time and not enough employees could be flown to prevent ruffled feelings, even with a drawing system.

Tom Barbour and I discussed the national press flights. We think that LAX and SFO should have separate flights. The LAX-NY flight could only take a few SFO area people and once again that city would be hanging on the tails of a LAX flight which would not be good for our relations up there. We have done nothing for the SFO press -- except for a [illegible] few -- in many years and we would want to cover the field widely when we inaugurate the jet, especially in view of the wide support we have received up there in connection with the route case. Even if nonstop SFO-NY authority is not granted, we could with a special flight such as this, make the trip from SFO to CHI to NY and return from NY to SFO nonstop to further emphasize the ability of the airplane, as well as to heighten interest again in the route case.

William H. Hipple

WHH;jf
cc: Willis Player - NYCP
Bud Sutherland-NYCP
Barbour - SFOS

[9073]

D + 30

This will be the first appearance of the 707 in San Francisco, and consequently, we will play the "delivery" theme with heavy overtones to help in the service case. This can be worked out on the spot and the length of time that the airplane will be on the ground will aid us heavily with the expanded planning.

D + 11

We will push the departure from SFO--continuing the service case theme--and restrict the ORD arrival to the special deals which will have been arranged. The same sort of thing will hold for the departure from ORD and the arrival at IDL.

D + 12-17

The airplane based at IDL will restrict our efforts for special deals.

D + 18

This will be intensively worked on because of the IDL-SFO nonstop. Although we are not planning to push any "record" aspects of these early training flights, it may be well to stress the IDL-SFO time, for obvious reasons. This will also offer us an excellent opportunity to show the turn-around features as it departs for Dallas. The DAL arrival, within the limits imposed by a non-AGF arrival, should be played for all it's worth. The broad pattern will follow the other arrivals. Once again, we will have plenty of time with the airplane.

D + 19

The return portion of the trip--DAL-SFO-IDL--ought to be hypoed as much as possible, both from the standpoint of pure publicity and the promotional aspects of the cargo. We should make special arrangements to publicize the SFO-IDL flying time.

D + 20-27

If the plane goes to LAX and remains there for crew training, we could use it for spot jobs while there. If it stays at IDL, the same holds true.

D + 28

The DAL-TUL trip will be notable only for the fact that this will be a Tulsa arrival. This will be another local planning job.

D + 29

The TUL-ORD should be routine, but the ORD stop should provide us with a chance to do some special-assignment work at that point. The LAX trip should be routine.

[9072]

[BOE 62]

October 7, 19
[year illegible]

Karl [illegible] - NYCP
Reg. Dir. Pub. Rel. - LAXS

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[9074]

ITEM 5

Following is a narrative-style schedule of the first NC airplane, the one which Public Relations and Sales will have for use beginning Dec. 15.

LAX

In LAX, Hipple has asked for three flights, for metropolitan press, radio and TV people, and suburban and county press. He has not specified a destination, but perhaps he might be interested in labeling his flights "Christmas in Arizona," complete with a trip to Tucson for an evening of dinner, entertainment and dancing for press and wives or girl friends. We could consult with the Tucson people and find out what local touches could be added -- things that make Christmas in Arizona different from Christmas in other places. Santa Claus on airplane, Christmas-type handouts.

The schedule would go something like this: Leave LAX 4:00 p.m., arrive TUS 6:00 p.m. A full evening of activity in Tucson, arriving back in LAX no later than midnight. The over-all effect should be a tremendous feeling of speed and comfort in accomplishing so much in such a short time. Also, the contract between LAX and TUS is dramatic enough to give the guests a feeling of having really been to a different place.

The daylight hours preceding these flights on all three days should be devoted to hour-long courtesy flights over "Old Mexico," and walk-throughs for the following groups: Employees -- perhaps only walkthroughs, but maybe including several actual flights for management designated by the Western Regional offices. Travel Agency Principals and/or Employees--we might want to invite not only the principal of the travel agency, but also might ask him to bring along two or three agency employees of his choosing. Commercial accounts--Again the size of the aircraft should make it possible to cover practically every important commercial account in the L.A. area. Depending on the number of these, we should consider inviting the "second person" at all of these accounts. In many places I believe that an assistant, and in some cases even a secretary has considerable control of the business. Press--Press here means secondary element of the working press, i.e. boys from the copy and photo desks, assistants to aviation and travel editors, rewrite people, business and financial desk, etc. (Managing, City and Sunday editors to be taken care of on Arizona flights, also Airport reporters or precinct reporters responsible for airport coverage).

For the aforementioned groups there should be a continuous buffet from start to conclusion. Important contacts in all areas can be solidified in large volume, and although the cost may double similar enterprises in past years, I believe it is justified, as we're talking about a lot more than double the airplane.

SFO

Duplicate PR flights with same destination. (Husbands and wives). Only two nights. Days to be used in SFO as in LAX for Sales (travel agents and commercial accounts) and lesser newspaper contacts. Also; Barbour should be asked to provide a list of citizens prominent in politics and in the service case, knocking out maybe one press flight to Arizona. In this case it seems wise to play large to the political and civic figures.

sent 8/ Recd [illegible] 27

[9075]

[BOE 63]

* * *

RECOMMENDATION FOR ADMIRAL APPOINTMENT

Instructions: Person making recommendation will fill out form completely in duplicate; use duplicate as file copy. Original will be routed for approvals as follows: (1) to District Sales Manager in whose territory proposed Admiral resides, (2) to Regional Vice President-Sales, (3) then to Admiralty Board, c/o General Sales Office, New York City, (4) when finally approved, will be returned with Admiral Card (certificate will be shipped separately) to District Sales Manager, (5) after presentation, return to Admiralty Board with T237, showing information requested.

SHOULD RECOMMENDATION NOT BE APPROVED, OFFICE DISAPPROVING WILL RETURN TO ORIGINATOR WITH COMMENTS.

Name: Howard (First) - (Middle) Waldorf (Last) Date of Recommendation 6/15/57

* * *

City: Oakland, Calif.

Business Connection Firm Oakland Chamber of Commerce

Position Manager, Aviation Divison Manager, Publicity Department

Firm Address: Street and No 1320 Webster Street

City Oakland Postal Zone 12 State California

1. Is the proposed a high-ranking legislative or civic leader? X (yes) (no)

   Briefly explain

2. Is the proposed a key officer of an outstanding or industrial concern? (yes) X (no)

3. Does the proposed personally travel frequently on AA? (yes) X (no)

   Estimate how frequently Two-three times annually.

4. Does the proposed influence the routing of passengers or freight by air in his organization X (yes) (no)

5. Does the proposed or his company affiliate have an ATP? X (yes) (no)

   If yes, what airline UAL

6. Who proposed this candidate for membership? J. E. Watkins

7. Other comments 25 years as a newspaperman and aviation writer prior to joining the Oakland Chamber of Commerce in his present capacity in 1945.

Signature of Employee Making Recommendation: Position: Zone Sales Manager

To Be Presented By: J. E. Watkins

* * * * *

[9076]

[BOE 64]

sent 6/3 rec'd 9/16

* * *

RECOMMENDATION FOR ADMIRAL APPOINTMENT

Instructions: Person making recommendation will fill out form completely in duplicate; use duplicate as file copy. Original will be routed for approvals as follows: (1) to District Sales Manager in whose territory proposed Admiral resides, (2) to Regional Vice President-Sales, (3) then to Admiralty Board, c/o General Sales Office, New York City, (4) when finally approved, will be returned with Admiral Card (certificate will be shipped separately) to District Sales Manager, (5) after presentation, return to Admiralty Board with T237, showing information requested.

SHOULD RECOMMENDATION NOT BE APPROVED, OFFICE DISAPPROVING WILL RETURN TO ORIGINATOR WITH COMMENTS.

Name: Eveleth (First) E. (Middle) Hayden (Last)

Date of Recommendation 5-27-57

* * *

City: Oakland

Business Connection: Firm Alameda County Industries, Inc.

Position: Secretary-Manager

Firm Address: Street and No 3124 East 14th Street

City Oakland Postal Zone ____ State California

1. Is the proposed a high-ranking legislative or civic leader? (yes) xx (no)

   Briefly explain But because of the nature of his work for the major firms in Alameda County, Mr. Hayden is well acquainted with both legislative and civic leaders.

2. Is the proposed a key officer of an outstanding or industrial concern? xx (yes) (no)

3. Does the proposed personally travel frequently on AA? (yes) xx (no)

   Estimate how frequently No travel

4. Does the proposed influence the routing of passengers or freight by air in his organization (yes) xx (no)

5. Does the proposed or his company affiliate have an ATP? (yes) xx (no)

   If yes, what airline ____

6. Who proposed this candidate for membership? C. C. Champion III

7. Other comments Mr. Hayden has been of considerable assistance with every docket before the CAB - giving support for AAL. He has enlisted the aid of all manufacturing associations in Alameda and Contra Costa Counties for docket #5903.

Signature of Employee Making Recommendation: /s/ C. C. Champion

Position: Sales Representative

To Be Presented By: C. C. Champion III

* * * * *

[9077]

[BOE 65-1]

AMERICAN AIRLINES

* * *

June 5, 1957

Mr. Kenneth Brown, Manager
San Mateo Chamber of Commerce
23 Second Street
San Mateo, California

Dear Mr. Brown:

Enclosed you will find a copy of the recommendation sent to the Chairman of the Civil Aeronautics Board by the San Francisco Chamber of Commerce, recommending that they expedite the hearing on the San Francisco-New York non-stop service.

Should you care to use this form, or something similar, it is quite in order to do so.

We would appreciate your sending five copies to the Civil Aeronautics Board, one to each Senator, and one to your Congressman.

We certainly appreciate your efforts in this matter. Will you please send me a copy of your letter.

Thank you.

Sincerely yours,

/s/ Juan Mir

Juan Mir
Sales Representative

JM:mw

Enclosure

[BOE 65 -p.2]

SAN FRANCISCO CHAMBER OF COMMERCE
San Francisco 4, California

Office of the President

May 24, 1957

COPY

The Honorable James Durfee
Chairman
Civil Aeronautics Board
Washington 25, D. C.

Subject: Severance and expedited Hearing San Francisco-New York non-stop service - CAB Docket No. 5903

My dear Mr. Durfee:

The San Francisco Chamber of Commerce, by action of its Board of Directors at a regular meeting on the 23rd day of May 1957, supports the efforts of the San Francisco Public Utilities Commission to obtain an expedited hearing before the Civil Aeronautics Board in Docket No. 5903 on additional non-stop service between San Francisco and New York.

This action is limited to the matter of an expedited hearing and is not to be construed as an expression of preference for any particular carrier.

We respectfully request that the position of the San Francisco Chamber of Commerce be made part of the record in this proceeding.

Respectfully yours,

E. D. Maloney
President

[9079]

[BOE 66]

William S. Mailliard
* * *

* * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

23 February 1959

Mr. Thomas Gray, Manager
DOWN TOWN ASSOCIATION
57 Post Street
San Francisco, California

Dear Tom:

Thank you for your letter of February 19, concerning the third San Francisco-New York nonstop carrier case before the Civil Aeronautics Board.

Ever since this matter was first brought to my attention, I have taken every possible step in an effort to impress upon the CAB the necessity for expeditious handling of this case and I am planning to appear personally at the time of the oral argument.

With best wishes,

Sincerely,

Member of Congress

WSM/mpd

[9080]

[BOE 67]

AMERICAN AIRLINES
918 Sixteenth Street, N. W.
Washington 6, D. C.

March 6, 1959

Mr. Thomas Gray
Executive Secretary
Downtown Association of
San Francisco
57 Post Street
San Francisco 4, California

Dear Tom:

I understand that Congressman Mailliard has advised you that he will make oral argument in the Non-stop Case. Thanks once more for your assistance in this matter. You have always been most generous with your time and effort.

I also want to extend my congratulations and best wishes to you on your recent appointment as Director of the San Francisco Bay Area Rapid Transit District. This is recognition of your many years of sincere and energetic civic achievements.

I look forward to seeing you very soon.

Best wishes,

Charles L. Strickler
Assistant to Vice President

[9081]

3-1

[BOE 68]

[RECEIVED - balance of
stamp illegible]

Tom Barbour

C

December 5, 1957

Mr. Albert E. Schlesinger
Vice President
San Francisco Downtown Association
57 Post Street
San Francisco 4, California

Dear Mr. Schlesinger:

We have had the privilege of reading the transcript of the presentation made by San Francisco to the Civil Aeronautics Board on December 2, and congratulation you on the effective representation of your city.

The presentation was excellent.

Sincerely yours,

C. W. Jacob

CWJ:MC

bcc Messrs. Bone
Shipley
Coon —
Holden

[9082]

[Rec'd Feb. 17, 1958, Transportation Dept.]

[BOE 69]

AMERICAN AIRLINES
918 Sixteenth Street, N. W.
Washington 6, D. C. Ex 3-2080

February 13, 1958

Mr. Charles C. Miller
Manager - Transportation Dept.
Chamber of Commerce
333 Pine Street
San Francisco 4, California

Dear Charlie:

At last I have had an opportunity to go through your exhibits submitted in the reopened Trans-Pacific Certificate Renewal Case, Docket No. 5030 Et Al to consider which of that type material might go into your exhibits in the San Francisco-New York nonstop case. Attached hereto are comments, page by page. I hope they are clear. Please call me if you wish to discuss any of them or any other matters relating to your exhibits. Of necessity there will be some duplication of this date in the City's exhbits but in different style and form.

One important thing that you may be able to develop is the story of the Bay Area's future plans for economic expansion. San Francisco has certainly had an impressive growth trend in the past, and hopefully you can develop a story on how the area will expand in the future.

If we can be of any assistance to you in anyway, please let me know. I am looking forward to seeing you soon.

Best regards,

/s/ Charlie

Charles L. Strickler
Assistant to Vice President

Enclosure

[9083]

[Received Feb. 1, 1958,
Transportation Dept.]

COMMENTS ON SAN FRANCISCO CHAMBER OF COMMERCE EXHIBITS TO BE USED IN SAN FRANCISCO-NEW YORK NONSTOP CASE

Pages 3 and 4

Leave as is. These pages do not relate directly to San Francisco-New York but do help to build up San Francisco/Oakland as an important area.

Pages 4(?) and 5

Do not think they apply in this case. We do at some point, however, want to develop San Francisco as the gateway to the Orient. Whether it is in the Chamber's exhibits or in the City's exhibits can be determined later. I am inclined at this point to think it should go in the City's exhibits.

Page 6 and 7

We are going to have to develop an extensive story on what San Francisco has done and plans to do in preparation for the jet age. I am inclined to think this should go in the City's exhibits.

Pages 8 and 9

Don't believe these contribute much.

Pages 10 and 11

You will want to revise the 1955 figures to reflect the latest sales management. I suppose you will want to take another look at 1960 to see if your past estimates still stand.

3/20— (On the subject of population and area, an important point which must be developed is the fact that all of northern California, and perhaps an ever larger area, will be benefited by an additional carrier between San Francisco

[9083]

and New York. This can be developed in the form of a map showing the area and a comparison of the elapsed times of present routings versus routings utilizing jet nonstops. This we will develop and, I believe, should go in the

[9084]

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Pages 4(?) and 5

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3/25 ✓ **Page 12**

If you have later figures, you will want to bring this exhibit up to date.

[9085]

Page 13

Instead of showing the number of new and expanded industries by year--which shows a decline--I suggest if you have the data that you show the total number of establishments by year, which will show an increase in number each year. If this is too difficult, perhaps an increase in total establishments, say from 1945 or 1946 to the present, can be shown. ✓ If you have the number of employees in these industries, it would probably show an impressive increase.

✓ **Pages 14 and 15.**

These are good and should be brought up to date if figures are available.

✓ **Page 16**

This exhibit is important when expanded to reflect the number of branch offices or other ties they have with specifically New York. Conversely, it will be most helpful if you can develop the number of branch offices located in San Francisco with home offices in New York--the type of information contained in pages 38-43 and 48-61 but with reference to New York.

[illegible]

✓ **Page 17**

Unless this is tied in some way with New York, can't see that it contributes much.

✓ **Page 18**

This is good and should be up-dated if possible.

✓ **Page 19**

Should be revised to reflect tie with New York.

Pages 20 and 21

This is good but do you have figures to show expansion or increase? Also later figures if available.

Page 22

Add later figures if available.

[9086]

Page 23

No comment.

Pages 24 - 27

Unless these are tied to New York in some specific way--have trouble seeing their value in this case. I am not saying these should not go in, but they suggest a stronger tie with Washington than with New York.

Pages 28 and 29

If later figures are available, should be brought up to date.

Page 30

This is good and you will probably want to revise if later figures are available.

Page 31

Don't believe this applies in this case.

Pages 32 and 33

You will want to reflect latest figures.

Pages 34 - 61

As stated with reference to page 16, you will want to prepare this type of community of interest between San Francisco and New York specifically.

[9087]

[BOE 70]

AMERICAN AIRLINES
918 Sixteenth Street, N. W.
Washington 6, D. C.

June 4, 1958

Mr. Charles C. Miller
Manager, Transportation Dept.
San Francisco Chamber of Commerce
333 Pine Street
San Francisco 4, California

Dear Charlie:

Attached is the list of prospective witnesses that you, Frank, and I compiled during my last visit to San Francisco. I am still attempting to get on paper the type of information we want from these people and the form or questionnaire to be used in obtaining it. At this time I propose to be in San Francisco next week to work on this subject and hope to have the questions and forms with me.

Looking forward to seeing you,

Best regards,

/s/ Charlie

Charles L. Strickler
Assistant to Vice President

Enclosure

[RECEIVED]

[9088]

[BOE 71]

AMERICAN AIRLINES
* * *
918 Sixteenth Street, N. W.
Washington 6, D. C.
* * *

[RECEIVED stamp]

June 5, 1958

Mr. Frank J. Needles
Deputy City Attorney
City Hall
San Francisco 2, California

Mr. Charles C. Miller
Manager, Transportation Dept.
San Francisco Chamber of Commerce
333 Pine Street
San Francisco 4, California

Dear Frank and Charlie:

Attached is a tentative outline of questions and items of information which, after your comments are received, can be mimeographed and used in interviewing the prospective user witnesses. I will be in San Francisco next week, and we can sit down and finalize these before mimeographing. These are not necessarily the questions nor order in which they will be asked of the witnesses on the stand but are questions that can give us basic information in determining whether the prospect will make a good witness.

In interviewing prospective user witnesses for the San Francisco-New York Nonstop Case, perhaps the first and crucial question to be covered is whether the particular company, association, or individual has had difficulty in obtaining space on desired nonstop service to New York. If the answer is no, the prospect would contribute little, if anything, as a witness, unless something unusual turns up in the interview that would be worthwhile in bringing out--such as a priority arrangement with TWA or United--and in all probability should not be used.

If the prospective witness has had difficulty in obtaining nonstop space, it is hoped that he will have some form of records to prove his difficulties (see item 7 of attached) rather than having to rely on assertions.

[9089]

In interviewing the prospective witnesses it may be necessary for us to develope with them the advantages and necessity of San Francisco receiving a third nonstop carrier to New York. We may have to review the entire background leading up to the urging of an immediate hearing on this matter. For example: the lag and inadequacy of service San Francisco has suffered; the fact that San Francisco-New York as early as 1938 and 1940 had in effect three carriers in the market but as a result of the evolution of equipment this has been gradually reduced to two, which in the nonstop (DC-7) era has resulted in this market becoming non-competitive since TWA has never provided truly competitive service with United, whereas, Los Angeles has had and will continue to have fully competitive service by three nonstop carriers; the fact that the two existing nonstop carriers have neglected San Francisco's cargo need to New York, whereas, Los Angeles has received a full pattern of cargo service with several all-cargo flights; the fact that if a third San Francisco-New York nonstop is not authorized, San Francisco will lag behind Los Angeles in receiving the more critical jet nonstop service; and so forth.

We can discuss all of this more thoroughly next week. I am looking forward to seeing you both.

Best regards,

/s/ Charlie

Charles L. Strickler
Assistant to Vice President

CLS: sp

Enclosure

[9090]

[BOE 72]

Office Of The Mayor
San Francisco

GEORGE CHRISTOPHER

[RECEIVED stamp]

January 30, 1959

The inauguration, on January 25, 1959, of jet nonstop service between Los Angeles and New York brings into reality the fears San Francisco has long been expressing to the Civil Aeronautics Board in its effort to obtain a third nonstop carrier to and from New York which could provide the earliest nonstop jet service. We in no way minimize the desirability and necessity of Los Angeles receiving nonstop jet service to and from New York.

The City's and my concern is predicated upon the adverse effect, the absence of similar air service between San Francisco and New York, will have on the economy of not only San Francisco but all of Northern California.

The attached editorial from the San Francisco Examiner, dated January 23, 1959, clearly defines the type of injury that San Francisco predicted would occur if the San Francisco-New York market did not receive nonstop jet service on or near the same date the Los Angeles-New York market received such service. The enclosed advertisement of Pan American from the New York Times dated January 26, 1959, proves conclusively that San Francisco's fears were justified. The advertisement expresses the advantage of a routing of traffic between the East Coast and the Pacific and the Orient through the Los Angeles gateway rather than the San Francisco gateway. Thus, the loss of this and other traffic placed in jeopardy the status of San Francisco as a major air transportation center and will unquestionably strip from San Francisco its hard-fought-for leadership as the gateway to the Pacific and the Orient.

This deterioration will spread and grow unless remedial action by the Civil Aeronautics Board is taken forthwith in the

San Francisco-New York Nonstop Case.

For nearly two years San Francisco has pleaded the nonstop air deficiencies and needs between New York and San Francisco, serving Northern California. The enclosed statement of procedural steps that have thus far been involved in the San Francisco-New York Nonstop Case shows that the case has not been "expedired" as ordered by the Civil Aeronautics Board in January, 1958.

It has now been over two and a half months since the briefs were filed with the Examiner. We do not in any way wish to be critical of the Examiner, being aware of the importance of the issue involved. However, after his initial decision there are other procedural steps such as, exceptions, briefs to the Board, oral argument, and the final decision. Unless the initial decision is submitted reasonably soon and unless the further procedural steps are truly expedited, the broadening gap between San Francisco-New York and Los Angeles-New York air service will most surely result in irreparable injury to San Francisco and Northern California.

Your fullest consideration of this letter and the attachments is urgently requested.

With every good wish, I am

Sincerely,

GEORGE CHRISTOPHER,
Mayor.

[9092]

STATE OF CALIFORNIA

Governor

Edmund G. Brown (Pat)-Democrat

Senators

	Party		
Clair Engle	Dem.	Red Bluff	(Former Representative. Won seat vacated by Wm. Knowland)
Thomas H. Kuchel	Rep.	Ansheim	

Representatives

District		Party	Home	Counties
First	Clement W. Miller	Dem.	Corte Madera	(7) Del Norte, Humboldt, Lake, Marin, Menodocino, Napa, Sonoma
Second	Harold Johnson (Won seat vacated by Clair Engle)	Dem.	Roseville	(19) Alpine, Amador, Butte, Calaveras, Eldorado, Inyo, Lassen, Mariposa, Modoc, Mono, Nevada, Placer, Plumas, Shasta, Sierra, Siskiyou, Tehama, Trinity, Tuoloumne
Third	John E. Moss, Jr.	Dem.	Sacramento	(6) Colusa, Glenn, Sacramento, Sutter, Yolo, Yuba
Fourth	William S. Mailliard	Rep.	San Francisco	City & County of San Francisco
Fifth	John F. Shelley	Dem.	San Francisco	City & County of San Francisco
Sixth	John F. Baldwin	Rep.	Martinez	(2) Contra Costa, Solano
Seventh	Jeffery Cohelan (Won seat of John Allen, Republican)	Dem.	Berkeley	Alameda
Eighth	George P. Miller	Dem.	Alameda	Alameda
Ninth	J. Arthur Younger	Rep.	San Mateo	San Mateo

[9093]

District		Party	Home		Counties
First	Clement W. Miller	Dem.	Corte Madera	(7)	Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, Sonoma
Second	Harold Johnson (Won seat vacated by Clair Engle)	Dem.	Roseville	(19)	Alpine, Amador, Butte, Calaveras, Eldorado, Inyo, Lessen, Mariposa, Modic, Mono, Nevada, Placer, Plumas, Shasta, Sierra, Siskiyou, Tehama, Trinity, Tuolumne
Third	John E. Moss, Jr.	Dem.	Sacramento	(6)	Colusa, Glenn, Sacramento, Sutter, Yolo, Yuba
Fourth	William S. Mailliard	Rep.	San Francisco		City & County of San Francisco
Fifth	John F. Shelley	Dem.	San Francisco		City & County of San Francisco
Sixth	John F. Baldwin	Rep.	Martinez	(2)	Contra Costa, Solano
Seventh	Jeffery Cohelan (Won seat of John Allen, Republican)	Dem.	Berkeley		Alameda
Eighth	George P. Miller	Dem.	Alameda		Alameda
Ninth	J. Arthur Younger	Rep.	San Mateo		San Mateo
Tenth	Charles S. Gubser	Rep.	Gilroy	(3)	San Benito, Santa Clara, Santa Cruz
Eleventh	John J. McFall	Dem.	Manteca	(2)	San Joaquin, Stanislaus
Twelfth	B. F. Sick	Dem.	Fresno	(3)	Fresno, Madera, Mercad

[9094]

PROCEDURAL STEPS IN SAN FRANCISCO-NEW YORK NONSTOP CASE D.N. 9214

In May 1957, the City of San Francisco and American Airlines filed motions for an expedited hearing on the single issue of an additional San Francisco-New York nonstop air carrier.

The CAB in June 1957 denied said motions but, due to the allegations contained therein, directed its staff to make a study of the San Francisco-New York nonstop route structure and service.

In January 1958, the Board, after completion of its staff's study, directed that an expedited hearing be held on the sole issue of an additional San Francisco-New York nonstop air carrier.

It was not until April 1958 that the Board denied petitions for reconsideration of TWA and United which opposed such a hearing.

On April 29, 1958, a pre-hearing conference was held. At this conference, the hearing date was set for July 8, 1958.

In June 1958, at the request of United and TWA, the hearing was delayed with the civic presentations to commence on July 30 and the carrier presentations delayed until September 9, 1958. (The reason for the gap between July 30 and September 9 is due to the August vacation schedule of the CAB.) Thus the strategic delay of three weeks in the start of the hearing caused a critical delay of two months in the conclusion of the hearing.

Pleadings of the City of San Francisco and American Airlines for reconsideration of the delayed procedural dates were denied.

On September 18, 1958 the hearing was concluded, and on November 10, 1958 briefs were filed with the Examiner.

["Examiner" editorial and Pan American advertisement were included in the letters to the Senators and Congressmen.]

'Go Via L. A.'

ON MONDAY, the day after American Airlines began jet passenger service between Los Angeles and New York, full page newspaper advertisements were taken in the two cities by that great international carrier, Pan American World Airways.

The Pan American advertisements congratulated American Airlines for linking the two coasts by jet, then pointed out that the American Airlines jets connected with its own fast services to Europe and the Orient.

The New York advertisement told the public there:

"Shortly after landing in Los Angeles you can be snugly settled in a Pan Am 'Super-7' Clipper—winging your way to Hawaii, and the exotic cities of the Orient. Thus, in one sweeping move, travel time between our east coast and the garden spots of the Pacific will be cut 20 per cent."

This was commendable enterprise on the part of Pan Am. Its business is carrying people. It knows the public likes the fastest ride with the fewest stops. So it told New Yorkers: For the fastest trip to the Orient, go via Los Angeles.

Pan Am has deep roots and a large stake in San Francisco. We are certain it would have been delighted to tell New York of a similar new fast service to the Orient via San Francisco.

It could not. San Francisco does not yet have transcontinental jet service—thanks to past mistakes and current wretched delays within the Civil Aeronautics Board.

L 64.

So there has come to pass the economic harm to San Francisco of which we have so long warned. San Francisco has traditionally been the gateway through which the largest single portion of air travel has moved to the Orient. That gateway dominance is of inestimable importance to San Francisco's commercial life. And it is gravely threatened, if it is not actually slipping away. Traffic once lost can be regained only by a prodigious effort.

San Francisco has not suffered this blow because of her own folly. She has suffered it because of the conduct of a regulatory body in Washington. That's what makes it intolerable.

P6

San Francisco Examiner
TRUTH, JUSTICE PUBLIC SERVICE
2 Sec. II— FRIDAY, JAN. 23, 1959 ★ CCCC*

The Day the Jets Didn't Fly Here

THIS COMING SUNDAY, Jan. 25, should be remembered as the day the Civil Aeronautics Board worked an unforgivable injury upon San Francisco.

Sunday morning American Airlines will start daily nonstop jet service between Los Angeles and New York.

The same airline was prepared to start the same service here simultaneously, had the CAB permitted it to compete as a third nonstop carrier on the San Francisco-New York route. But, despite years of pleading by San Francisco, despite specific warnings from San Francisco of the widespread economic injury the city would suffer, and despite the CAB's promise a year ago to "expedite" the case, it still has not acted.

Thus the CAB has repeated the economic harm done San Francisco a decade ago. At that time, because Los Angeles had three unrestricted carriers on the transcontinental run and thus stiffer competition among them, it got nonstop flights to New York with conventional airplanes almost a year ahead of San Francisco.

What does the loss of competitive service mean to a city? Air travelers fly the routes with the shortest flight time and the fewest stops. Sunday the air time between Los Angeles and New York will be cut to 4½ hours eastbound, 5½ hours westbound. The San Francisco-New York air time will remain 8 to 9 hours eastbound, 8½ to 10 hours westbound.

Sunday it will become possible for a traveler to board a morning jet in Los Angeles, switch to a Pan American jet in New York and reach Paris in just 13½ hours elapsed time from Los Angeles.

Lack of similar fast schedules means San Francisco will lose transcontinental traffic, lose west coast-to-Europe traffic and lose east coast-to-Orient traffic. Lost traffic means lost business of all kinds. Lost traffic weakens San Francisco's position as a global air center.

That is why we said in the beginning, and now repeat, that the CAB has worked an unforgivable injury upon San Francisco.

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1 page not read

GEORGE CHRISTOPHER

30, 1959

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BOE 72
p. 7

[9097]

[BOE 73-1]

May 24, 1957

The Honorable Thomas H. Kuchel
Senate Office Building
Washington 25, D. C.

Subject: Severance and expedited Hearing San Francisco-New York non-stop service - CAB Docket No. 5903

My dear Senator Kuchel:

Attached is a copy of the letter of the San Francisco Chamber of Commerce to the Civil Aeronautics Board supporting the San Francisco Public Utilities Commission in the above entitled matter.

It is our understanding that you have been furnished copies of the resolution of the Board of Supervisors of the City and County of San Francisco and the Public Utilities Commission. The Chamber's action is in support thereof.

We respectfully enlist your cooperation to the fullest extent in securing an expedited hearing in this matter which is so vitally important to San Francisco and northern California.

Respectfully yours,

E. D. Maloney
President

Same letter was sent to:
Senator Knowland, Congressmen Mailliard, Shelley, Younger, Allen, Scudder, Baldwin, Miller.

[9098]

[BOE 73-2]

C
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P
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May 24, 1957

The Honorable James Durfee
Chairman
Civil Aeronautics Board
Washington 25, D. C.

Subject: Severance and expedited Hearing San Francisco-New York non-stop service - CAB Docket No. 5903

My dear Mr. Durfee:

The San Francisco Chamber of Commerce, by action of its Board of Directors at a regular meeting on the 23rd day of May 1957, supports the efforts of the San Francisco Public Utilities Commission to obtain an expedited hearing before the Civil Aeronautics Board in Docket No. 5903 on additional non-stop service between San Francisco and New York.

This action is limited to the matter of an expedited hearing and is not to be construed as an expression of preference for any particular carrier.

We respectfully request that the position of the San Francisco Chamber of Commerce be made part of the record in this proceeding.

Respectfully yours,

E. D. Maloney
President

Copy of this letter to :
Senator Knowland, Congressmen Mailliard, Shelley, Younger, Allen, Scudder, Baldwin, Miller

[9099]

[BOE 74-1]

J. ARTHUR YOUNGER
* * *

Mr Miller
* * *
Mr Fox

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

May 27, 1957

Dear Mr. Maloney:

I shall be happy to do what I can in the furtherance of additional non-stop service between San Francisco and New York.

Attached is a copy of a letter that I have forwarded to the Civil Aeronautics Board on this subject.

Cordially yours,

/s/ J. Arthur Younger

J. Arthur Younger, M. C.
9th District, California

Mr. E. D. Maloney, President
San Francisco Chamber of Commerce
333 Pine Street
San Francisco, California

JAY:ld
Enclosure

[9100]

[BOE 74-2]

J. ARTHUR YOUNGER
* * *

* * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

May 27, 1957

COPY

Dear Mr. Durfee:

In Re: CAB Docket No. 5903

I sincerely hope that the Civil Aeronautics Board will give prompt hearing to the above application.

The San Francisco International Airport now originates over a million passengers a year, and the additional non-stop service to New York is needed.

Cordially yours,

J. Arthur Younger, M. C.
9th District, California

Hon. James Durfee, Chairman
Civil Aeronautics Board
Washington 25, D. C.

JAY:ld

cc: Mr. E. D. Maloney

[9101]

[BOE 75]

* * * *

JUN 3 1957

~~Mr. Fox~~
Mr. Miller

UNITED STATES SENATE
Committee On
Interior and Insular Affairs

May 27, 1957

Mr. E. D. Maloney, President
San Francisco Chamber of Commerce
333 Pine Street
San Francisco 4, California

Dear Mr. Maloney:

Thank you very much for your letter of May 24 relative to CAB Docket No. 5903.

I have been discussing this with representatives of the City of San Francisco, and I have now been assured by the Civil Aeronautics Board that the motion filed by American Airlines urging an expedited hearing will receive the Board's most careful consideration subsequent to May 28, the date on which answers to American's motion are due.

Sincerely yours,

/s/ Thomas H. Kuchel

Thomas H. Kuchel
United States Senator

K:Wj

[Stamp] JUN 3 1957

[9102]

[BOE 76]

* * *

Mr. Miller

* * *

JUN 3 1957

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

May 28, 1957

Mr. E. D. Maloney
President
San Francisco Chamber of Commerce
San Francisco 4, California

Dear Mr. Maloney:

Thank you for your letter of May 24 to which you attached a copy of a letter to the Civil Aeronautics Board in support of immediate consideration of American Airlines' application for non-stop service between San Francisco and New York.

I have written to the Civil Aeronautics Board expressing my interest in the status of this application, and I shall be pleased to write to you again as soon as I have a reply.

Cordially yours,

/s/ John J. Allen, Jr.

John J. Allen, Jr.

JJA/sc-1
85/22-28

[Stamp] JUN 3 1957

[BOE 77]

JOHN F. BALDWIN
* * *

JUN 3 1957

~~Mr Fox~~
Mr Miller
* * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

May 28, 1957

Mr. E. D. Maloney, President
San Francisco Chamber of Commerce
San Francisco 4, California

Dear Mr. Maloney:

Thanks very much for your kind letter of May twenty-fourth. It is thoughtful of you to urge hearings upon CAB Docket No. 5903. I have already received considerable correspondence upon this subject and have written the Civil Aeronautics Board urging the scheduling of hearings upon this docket.

With kindest regards,

Sincerely yours,

/s/ John F. Baldwin

JOHN F. BALDWIN
Representative in Congress
Sixth District

jfb: m

[Stamp] JUN 3 1957

[9104]

[BOE 78]

HUBERT B. SCUDDER

* * *

~~JUN 4~~ 1957

Miller
~~Fox~~ * * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

May 28, 1957

Mr. E. D. Maloney, President
San Francisco Chamber of Commerce
San Francisco 4, California

Dear Mr. Maloney:

I have your letters of May 24 relative to American Airlines application presently pending before the Civil Aeronautics Board for nonstop service between San Francisco and New York.

This matter was brought to my attention early last week and I immediately got in touch with officials of the Civil Aeronautics Board. In the meantime, I have also written Mr. Durfee, the Chairman of the Board expressing my interest and requesting that I be kept advised. I will continue to keep in touch with the matter.

Assuring you of my desire to cooperate with you and with best wishes, I am,

Very sincerely yours,

/s/ Hubert B. Scudder

HBS:gch

[Stamp] JUN 4 1957

[9105]

[BOE 79-1]

~~Mr [illegible]~~ Mr Miller
* * *

JOHN F. SHELLEY
* * *

JUN 3 1957

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

May 28, 1957

Mr. E. D. Maloney, President
San Francisco Chamber of Commerce
333 Pine Street
San Francisco, California

Dear Mr. Maloney:

This will acknowledge receipt of your letter of May 24 with a copy of the letter of the San Francisco Chamber of Commerce to the Civil Aeronautics Board supporting the San Francisco Public Utilities Commission in the matter of the severance and expedited hearing by the CAB on their Docket 5903.

I have been meeting with representatives of American Airlines, Inc. over the past two weeks and am informed on the ramifications of this request by American. Enclosed with this letter is a copy of my letter to the members of the Civil Aeronautics Board. As soon as I hear further from the Board, I will advise you.

With kind regards, I am

Sincerely yours,

/s/ John F. Shelley

M. C.

h

[Stamp] JUN 3 1957

[9106]

[BOE 79-2]

JOHN F. SHELLEY
* * *

* * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

May 28, 1957

COPY

Mr. Chan Gurney
Civil Aeronautics Board
Washington, D. C.

Dear Mr. Gurney:

This letter is addressed to you in connection with the motion of American Airlines, Inc. to sever and set down for immediate hearing the San Francisco-New York nonstop portion of its application in Docket No. 5903.

In this request for an immediate hearing before the Civil Aeronautics Board on this part of the American Airlines application, I believe the company is fully justified in asking for a hearing in view of developments since the time of the original hearings and particularly in view of the fact the Board did not pass upon the question of whether there was a need for an additional nonstop carrier in the market. San Francisco on a national basis is the most important air market with only two nonstop carriers between New York and San Francisco. As one who travels quite a bit between the East Coast and San Francisco, I understand this lack of service personally and the effect it has on passengers wishing to make a quick and convenient trip between San Francisco and New York.

I trust the Board will see fit to at least grant the petitioner, American Airlines, Inc., an immediate opportunity to be heard on this matter and that when the Board does set this for hearing you will notify me of the time and place where it will take place. I am very vitally interested in the matter of inadequate service now being offered to air travelers between the two cities and would like to add that I would be happy to meet with you and the other members of the Board at any time to discuss this situation with you.

In the knowledge that you will give this request your earnest consideration and as a native San Franciscan and a Representative of San Francisco in the Congress, I know you will give my letter your prompt consideration.

Sincerely yours, /s/ John F. Shelley, M.C.

c

[9107]

[BOE 80]

* * *

JUN 13 1957

~~Mr Foot~~
Mr Muller

UNITED STATES SENATE
Committee On Appropriations

May 29, 1957

Dear Mr. Maloney:

Your letter of May 24 has been received and I greatly appreciated your forwarding to me a copy of your communication to the Chairman of the Civil Aeronautics Board regarding American Airlines' application for non-stop service between San Francisco and New York.

I have contacted the Chairman of the Civil Aeronautics Board and have requested a status report on this application. You may be certain that it will continue to receive my close and personal attention.

With kind regards, I remain

Sincerely yours,

/s/ William F. Knowland

William F. Knowland

Mr. E. D. Maloney
President
San Francisco Chamber of Commerce
San Francisco 4, California

[Stamp] JUNE 3 1957

[9108]

[BOE 81-1]

WILLIAM S. MAILLIARD
* * *

JUN 3 1957

~~Mr. Foote~~ Mr. Miller * * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

29 May 1957

Mr. E. D. Maloney, President
SAN FRANCISCO CHAMBER OF COMMERCE
333 Pine Street
San Francisco 4, California

Dear Ed:

Thanks for your letter of May 24, exclosing a copy of your letter to the CAB, urging expeditious consideration of CAB Docket No. 5903, American Air Lines application for nonstop service between New York and San Francisco.

The growth of San Francisco as a major air terminal is a matter of continuing interest to me and the CAB is thoroughly familiar with my feeling that the City's requests for additional service and expanded facilities receive consideration comparable to that given other cities as strategically located.

I wrote the Board recently requesting that expeditious consideration be given American Air Lines application for this service and am enclosing a copy of Chairman Durfee's reply for your information.

I will keep you advised of any additional information that may be made available to me by the Civil Aeronautics Board.

With best wishes,

Sincerely,

/s/ Bill

Member of Congress

WSM/mao

Enclosure

[Stamp] JUN 3 1957

[9109]

[BOE 81-2]

C O P Y

CIVIL AERONAUTICS BOARD
Washington 25

May 27, 1957

Honorable William S. Mailliard
House of Representatives
Washington, D. C.

Dear Congressman Mailliard:

This will acknowledge your letter of May 21, 1957, enclosing correspondence to you with reference to the request of American Airlines for establishment of nonstop service between New York and San Francisco in Docket No. 5903.

American Airlines has filed a motion with the Board urging an expedited hearing on its application which would make possible such a service. Answers to this motion are due on May 28, 1957, and the matter will then receive the Board's most careful consideration.

In view of your interest, instructions have been given that you be advised of the Board's action in connection with this motion.

We are returning your correspondence herewith.

Sincerely yours,

/s/ JAMES R. DURFEE

Chairman

Enclosures (4)

C O P Y

[9110]

[BOE 82]

GEORGE P. MILLER
* * *

JUN 3 1957

~~Mr [illegible]~~
Mr Miller
* * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

May 29, 1957

Mr. E. D. Maloney
President
San Francisco Chamber of Commerce
San Francisco 4, California

My dear Mr. Maloney:

I have for acknowledgement your letter, with enclosures, of May 24, concerning CAB Docket No. 5903.

I am pleased to tell you that I have already communicated with the Civil Aeronautics Board in support of the additional San Francisco-New York nonstop service.

I want to thank you for writing me and letting me know your interest in this matter.

Sincerely,

/s/ Geo. P. Miller
GEORGE P. MILLER

GPM:c

[Stamp] JUN 3 1957

[9111]

[BOE 83-1]

~~Mr Fox~~
Mr Miller

J. ARTHUR YOUNGER

* * *

JUN 14 1957

* * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

June 8, 1957

5903

Dear Mr. Maloney:

Attached is a copy of a letter just received from the Civil Aeronautics Board which is self-explanatory.

I shall continue to keep you advised.

Cordially yours,

/s/ J. Arthur Younger

J. Arthur Younger, M. C.
9th District, California

Mr. E. D. Maloney, President
San Francisco Chamber of Commerce
333 Pine Street
San Francisco, California

JAY:vr
Enclosure

[9112]

[BOE 83-2]

CIVIL AEROANUTICS BOARD
WASHINGTON 25

June 5, 1957

COPY

Honorable J. Arthur Younger
House of Representatives
Washington, D. C.

Dear Congressman Younger:

This will acknowledge your letter of May 27, 1957, urging the Board to assign a prompt hearing on the application of American Airlines in Docket No. 5903 to provide nonstop service between San Francisco and New York.

American has filed a motion requesting expeditious hearing on its application which will make possible nonstop service between New York and San Francisco. Answers have been filed to this motion by a number of parties and the matter is now before the Board for consideration.

Your interest and the interest of San Francisco in the request of American for an expeditious hearing is appreciated and you can be sure that most careful consideration will be given to the contentions advanced by all interested parties.

In view of your interest, instructions have been given that you be advised of the Board's action on this request.

Sincerely yours,

James R. Durfee

Chairman

[9113]

[RECEIVED stamp]

[BOE 84]

WILLIAM S. MAILLIARD

* * *

JUL 2 1957

~~Mr. Fay~~
Mr. Miller

* * *

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

27 June 1957

CAB 5903

Mr. E. D. Maloney, President
SAN FRANCISCO CHAMBER OF COMMERCE
333 Pine Street
San Francisco 4, California

Dear Ed:

This morning I was furnished a copy of CAB Order No. E-11493, denying the motion of American Airlines for an expedited hearing on Docket No. 5903.

I sincerely regret that it was not possible to secure a more favorable decision on the Motion now; however, I was assured that it is the Board's intention to reconsider its decision on or about December 1. In view of the allegations contained in the petition and supporting documents, the Board has directed the staff to review the problem of the air service pattern between New York and San Francisco and report the results of that study to the Board so that it may examine the public need for an early hearing on the issue of nonstop service.

Informally, I was advised that failing a favorable decision in December, Docket No. 5903 might reasonably be expected to come before the CAB in its regular turn late next summer, and it was estimated that about twelve to eighteen months would elapse thereafter before a final decision might be rendered.

I assure you that I will continue my interest in effecting an early and favorable resolution of the matter.

With best wishes,

Sincerely,

/s/ Bill

Member of Congress

WSM/mao

[Stamp] JUL 2 1957

[BOE 85]

SAN FRANCISCO CHAMBER OF COMMERCE
333 Pine Street

October 13, 1958

Mr. Bruce Craver
General Manager
Greater Sacramento Chamber of Commerce
917 - 7th Street
Sacramento, Calif.

Subject: CAB Docket No. 9214 et al
San Francisco/Oakland - New York/
Newark nonstop case

Gentlemen:

The San Francisco Chamber of Commerce and the City and County of San Francisco have intervened in the above entitled case and have supported the need for additional nonstop air carrier service between San Francisco and New York. Hearings in this proceeding were held in San Francisco July 30, 31 and August 1, 1958 and in Washington, D.C. September 9 through September 19, 1958. The brief dates in this proceeding have been set for November 6, 1958.

We feel that it is vitally important that the Chambers of Commerce in the San Francisco Bay Area and Northern California support the position of the San Francisco Chamber in its effort to obtain additional nonstop air carrier service between San Francisco and New York. Our position becomes more important as we enter the jet era.

Without effective aggressive competition in this large San Francisco-New York air traffic market, the San Francisco International Airport will loose its dominant position as a major domestic and international air traffic center.

We therefore urge your Chamber to file with the Civil Aeronautics Board a statement to the Examiner in this proceeding under Rule 14. For your ready reference and guidance we are attaching hereto a skeleton form of statement which we believe would be an effective way for your Chamber to advise the CAB of its support of San Francisco's position in this proceeding. This form is merely a sample. It is preferable that you use your own form and wording.

[9115]

An Original and 19 copies should be addressed to Examiner Walter W. Bryan, Civil Aeronautics Board, Washington 25, D. C. and mailed not later than November 1st. In addition, copies should be sent to all parties of record as indicated in the attached list, entitled "Parties of Record."

We also would like you to furnish us with an extra copy of your statement. Should there be any further questions, or if we can be of any assistance, please let us know.

Yours very truly

/s/ Chas. C. Miller

Charles C. Miller, Manager
Transportation Department

CCM:MR
Encls.

[9116]

[BOE 85]

BEFORE THE
CIVIL AERONAUTICS BOARD

In the matter of)
SAN FRANCISCO/OAKLAND -)
NEW YORK/NEWARK) Docket No. 9214 et al
NONSTOP CASE)

STATEMENT UNDER RULE 14
ON BEHALF OF THE
______________ CHAMBER OF COMMERCE
TO EXAMINER WALTER W. BRYAN

1) This statement is submitted under Rule 14 of the Rules of Practice in Economic Proceedings of the Civil Aeronautics Board and is authorized by Resolution _______ of the _________ Chamber of Commerce.

2) _____________ Chamber of Commerce is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business at ________________, California.

Among other things the Chamber is organized for and is actively engaged in the development, expansion and protection of industry and commerce in (city) and area immediately adjacent thereto.

3) San Francisco/Oakland is named as the West Coast terminal point in this proceeding. Members of the Chamber and other residents of __________ and the area immediately adjacent thereto are dependent upon and utilize the San Francisco International Airport as their gateway for air service to and from New York.

4) (Statement of population of area) the principal city and population

5) (Principal industries)

6) (Principal agriculture crops) include statement of heavy movement to New York area if any

[9117]

7) If area is nationally known as a resort or sports area state and describe

8) __________ maintains and operates its own airport and is served by __________ local carriers (name them)

9) __________ is dependent upon air transportation (give reasons why).

It is estimated that about __________ persons travel between __________ and New York area annually.

10) The most direct route between __________ and New York is via San Francisco. An increase in the number of non-stop carriers between San Francisco and New York will benefit and improve the air service between __________ and New York.

THEREFORE: __________ Chamber of Commerce supports the San Francisco Chamber of Commerce in its effort to obtain additional competitive non-stop air carrier service between San Francisco and New York. Such service would be a direct economic benefit to our industrial growth and expansion and our tourist development. With the advent of the jet era and the inauguration of jet service with larger and faster planes, the Chamber believes there will be a tremendous increase in the traffic of persons and property by air between ____________ and New York through the San Francisco gateway.

Respectfully submitted,
_________ CHAMBER OF COMMERCE

(Signature)
____
Name
Title

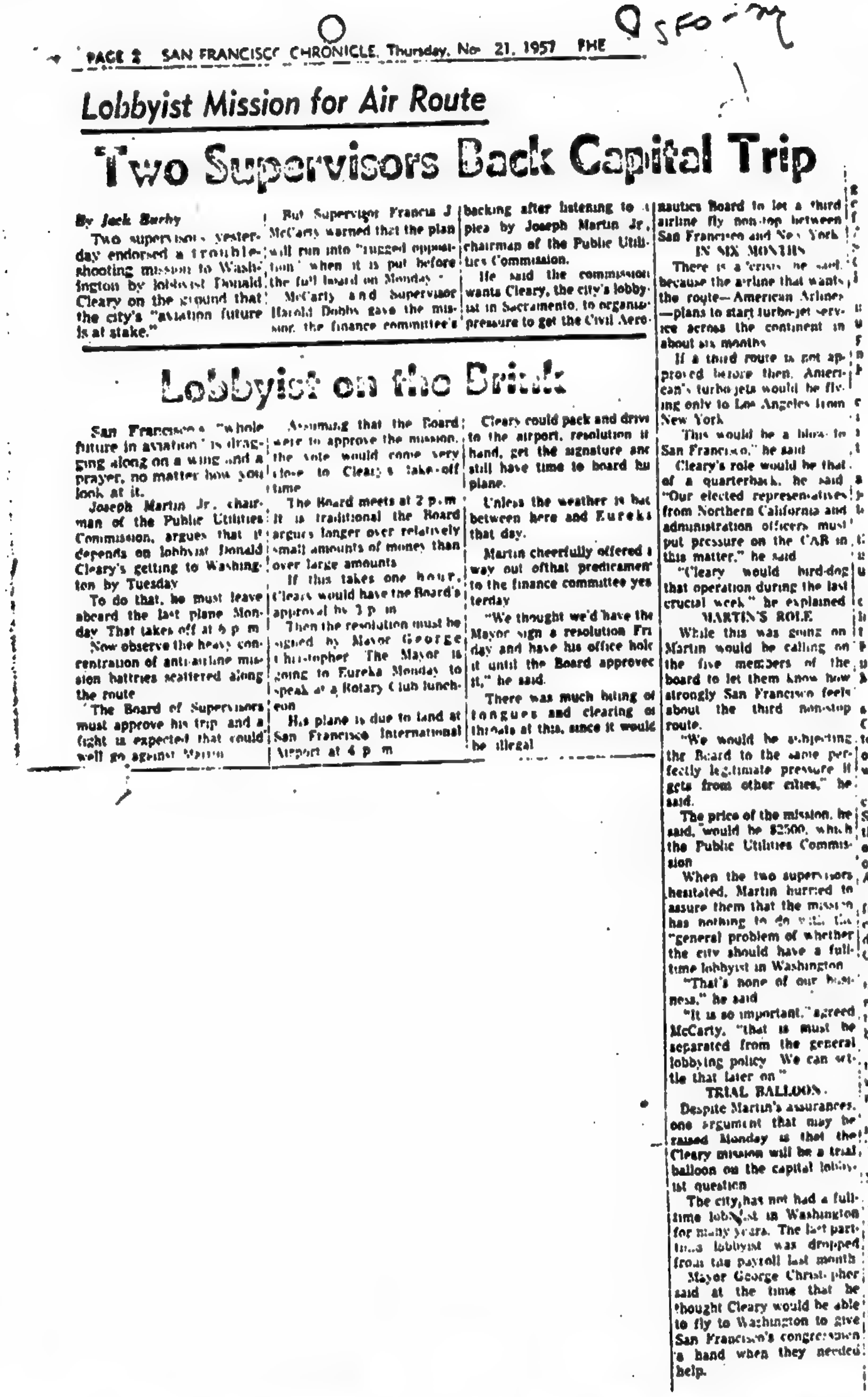
[9118]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing statement upon all parties of record and known parties of interest by mailing a copy thereof to each party postage prepaid.

____
Name

Dated at ______________, California
this . . . . day of . . . . 1958.



PAGE 2 SAN FRANCISCO CHRONICLE, Thursday, Nov. 21, 1957 THE

SFO-m

Lobbyist Mission for Air Route

Two Supervisors Back Capital Trip

By Jack Burby

Two supervisors yesterday endorsed a trouble-shooting mission to Washington by lobbyist Donald Cleary on the ground that the city's "aviation future is at stake."

But Supervisor Francis J McCarty warned that the plan will run into "rugged opposition" when it is put before the full board on Monday.

McCarty and Supervisor Harold Dobbs gave the mission the finance committee's backing after listening to a plea by Joseph Martin Jr., chairman of the Public Utilities Commission.

He said the commission wants Cleary, the city's lobbyist in Sacramento, to organize pressure to get the Civil Aeronautics Board to let a third airline fly non-stop between San Francisco and New York.

IN SIX MONTHS

There is a "crisis," he said, because the airline that wants the route—American Airlines—plans to start turbo-jet service across the continent in about six months.

If a third route is not approved before then, American's turbo-jets would be flying only to Los Angeles from New York.

"This would be a blow to San Francisco," he said.

Cleary's role would be that of a quarterback, he said. "Our elected representatives from Northern California and administration officers must put pressure on the CAB in this matter," he said.

"Cleary would bird-dog that operation during the last crucial week," he explained.

MARTIN'S ROLE

While this was going on Martin would be calling on the five members of the board to let them know how strongly San Francisco feels about the third non-stop route.

"We would be subjecting the Board to the same perfectly legitimate pressure it gets from other cities," he said.

The price of the mission, he said, would be $2500, which the Public Utilities Commission

When the two supervisors hesitated, Martin hurried to assure them that the mission has nothing to do with the "general problem of whether the city should have a full-time lobbyist in Washington.

"That's none of our business," he said.

"It is so important," agreed McCarty, "that is must be separated from the general lobbying policy. We can settle that later on."

TRIAL BALLOON.

Despite Martin's assurances, one argument that may be raised Monday is that the Cleary mission will be a trial balloon on the capital lobbyist question.

The city has not had a full-time lobbyist in Washington for many years. The last part-time lobbyist was dropped from the payroll last month.

Mayor George Christopher said at the time that he thought Cleary would be able to fly to Washington to give San Francisco's congressmen a hand when they needed help.

Lobbyist on the Brink

San Francisco's "whole future in aviation" is dragging along on a wing and a prayer, no matter how you look at it.

Joseph Martin Jr., chairman of the Public Utilities Commission, argues that it depends on lobbyist Donald Cleary's getting to Washington by Tuesday.

To do that, he must leave aboard the last plane Monday. That takes off at 6 p. m.

Now observe the heavy concentration of anti-airline mission batteries scattered along the route.

The Board of Supervisors must approve his trip and a fight is expected that could well go against Martin.

Assuming that the Board were to approve the mission, the vote would come very close to Cleary's take-off time.

The Board meets at 2 p. m. It is traditional the Board argues longer over relatively small amounts of money than over large amounts.

If this takes one hour, Cleary would have the Board's approval by 3 p. m.

Then the resolution must be signed by Mayor George Christopher. The Mayor is going to Eureka Monday to speak at a Rotary Club luncheon.

His plane is due to land at San Francisco International Airport at 4 p. m.

Cleary could pack and drive to the airport, resolution in hand, get the signature and still have time to board his plane.

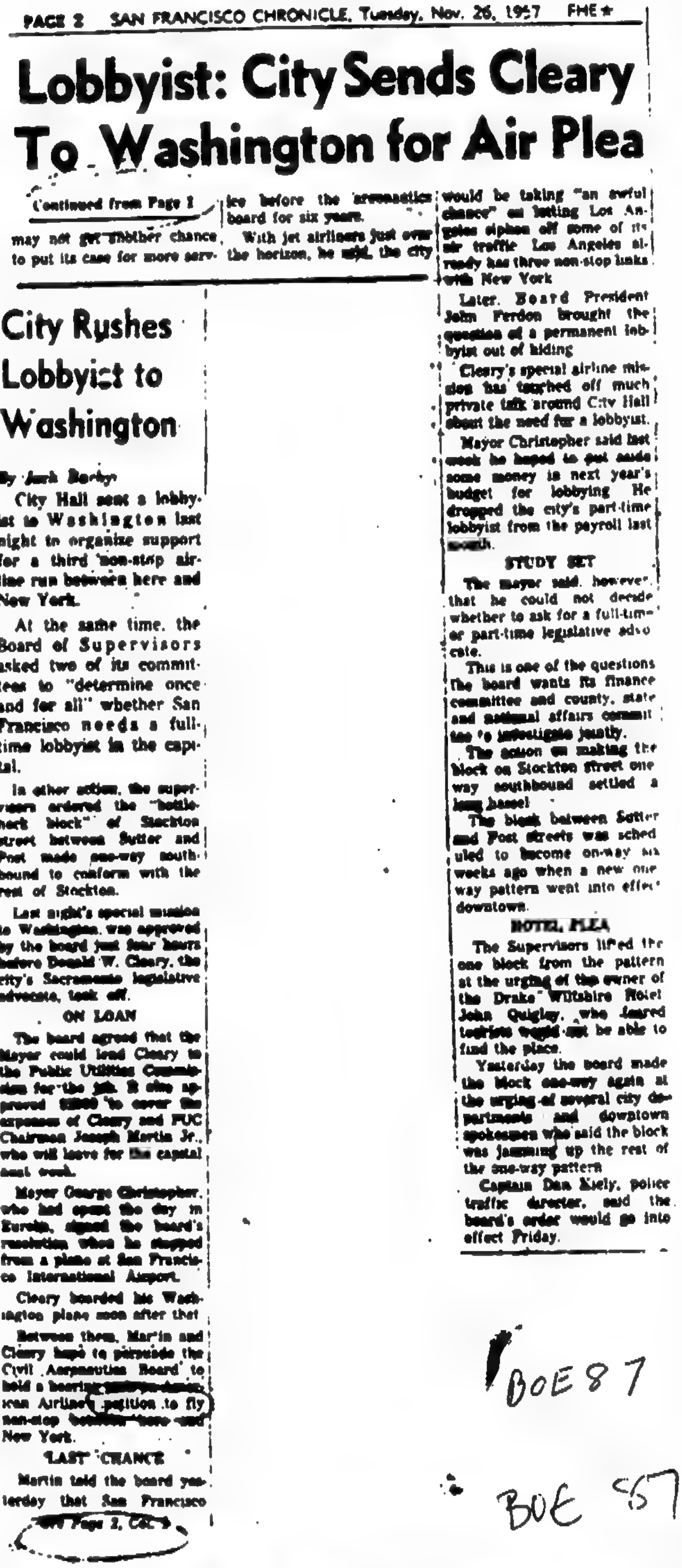
Unless the weather is bad between here and Eureka that day.

Martin cheerfully offered a way out of that predicament to the finance committee yesterday.

"We thought we'd have the Mayor sign a resolution Friday and have his office hold it until the Board approves it," he said.

There was much biting of tongues and clearing of throats at this, since it would be illegal.

BOE 81



PAGE 2 SAN FRANCISCO CHRONICLE, Tuesday, Nov. 26, 1957 FHE ★

Lobbyist: City Sends Cleary To Washington for Air Plea

City Rushes Lobbyist to Washington

By Jack Burby

City Hall sent a lobbyist to Washington last night to organize support for a third non-stop airline run between here and New York.

At the same time, the Board of Supervisors asked two of its committees to "determine once and for all" whether San Francisco needs a full-time lobbyist in the capital.

In other action, the supervisors ordered the "bottleneck block" of Stockton street between Sutter and Post made one-way southbound to conform with the rest of Stockton.

Last night's special mission to Washington was approved by the board just four hours before Donald W. Cleary, the city's Sacramento legislative advocate, took off.

ON LOAN

The board agreed that the Mayor could lend Cleary to the Public Utilities Commission for the job. It also approved [illegible] to cover the expenses of Cleary and PUC Chairman Joseph Martin Jr., who will leave for the capital next week.

Mayor George Christopher, who had spent the day in Europe, signed the board's resolution when he stepped from a plane at San Francisco International Airport.

Cleary boarded his Washington plane soon after that.

Between them, Martin and Cleary hope to persuade the Civil Aeronautics Board to hold a hearing [illegible]ican Airlines petition to fly non-stop between here and New York.

LAST CHANCE

Martin told the board yesterday that San Francisco

See Page 2, Col. [illegible]

Continued from Page 1

may not get another chance to put its case for more service before the aeronautics board for six years.

With jet airliners just over the horizon, he said, the city would be taking "an awful chance" on letting Los Angeles siphon off some of its air traffic. Los Angeles already has three non-stop links with New York.

Later, Board President John Ferdon brought the question of a permanent lobbyist out of hiding.

Cleary's special airline mission has touched off much private talk around City Hall about the need for a lobbyist.

Mayor Christopher said last week he hoped to put aside some money in next year's budget for lobbying. He dropped the city's part-time lobbyist from the payroll last month.

STUDY SET

The mayor said, however, that he could not decide whether to ask for a full-time or part-time legislative advocate.

This is one of the questions the board wants its finance committee and county, state and national affairs committee to investigate jointly.

The action on making the block on Stockton street one way southbound settled a long hassel.

The block between Sutter and Post streets was scheduled to become on-way six weeks ago when a new one way pattern went into effect downtown.

HOTEL PLEA

The Supervisors lifted the one block from the pattern at the urging of the owner of the Drake-Wiltshire Hotel John Quigley, who feared tourists would not be able to find the place.

Yesterday the board made the block one-way again at the urging of several city departments and downtown spokesmen who said the block was jamming up the rest of the one-way pattern.

Captain Dan Kiely, police traffic director, said the board's order would go into effect Friday.

BOE 87

BOE 57

[9121]

[BOE 88]

Mr Barbour

December 5, 1957

Mr. Joseph Martin
Chairman
Public Utilities Commission
San Francisco
California

Dear Mr. Martin:

I have just read the transcript of your appearance before the Civil Aeronautics Board on December 2, and hasten to say that San Francisco was ably represented. This kind of presentation with restrictions placed on what you can say is more difficult than a formal one. The Board knows that, of course, and it seemed to me that your statements were just right under the circumstances and, for that reason, all the more effective.

Congratulations to you.

Sincerely yours,

C. W. Jacob

CWJ:MC

bcc Messrs. Bone
Shipley
Coon
Holden

S.F. Wins Hearing on Bid for Nonstop N.Y. Plane Service

The Civil Aeronautics Board, by a 3-2 decision, called yesterday for an "expeditious" hearing on American Airlines' request for permission to start nonstop service between San Francisco and New York.

The decision, announced in Washington, was a clear victory for San Francisco city officials who had lobbied vigorously for just that decision.

San Francisco now has only two airlines offering non-stop service to New York, Los Angeles has three.

ACTION URGED.

The majority in the CAB decision was composed of Vice Chairman Chan Gurney, Joseph Minetti and Louis J. Hector. Chairman James R. Dufee and Harmar D. Denny, dissented.

The majority held that "on the basis of information now available to it, the board finds that prompt examination of the need for additional nonstop authorization between New York and San Francisco is warranted."

FACTOR CITED.

It commented that an important factor in its decision was that the hearing would be an opporunity for the board's first full scale investigation of the "imminent impact" of the operation of jet aircraft "in a market of the size and importance of that involved here."

American Airlines is expected to put the first jet transports into domestic service in January, 1959, and has said they would join the runs from here simultaneously with those from Los Angeles if the company's petition is granted by the CAB.

3 MAN MAJORITY.

The three man majority pointed out that this aspect of the industry will become increasingly important to the board's regulatory processes in the next several years.

It commented that "it is expected, therefore, that the applicant and intervening carriers will give careful consideration in their exhibits in this case to the effects of their planned operation of jet aircraft in this market. . . ."

Durfee and Denny's minority opinion said that "to assure fair and equitable treatment to all interests, the board must serve — and particularly to the several other communities in this country that have sought and been denied expedited hearings for improved service in recent months, we must balance the urgency of San Francisco's need against that of the other cities and interests."

The dissenters further claimed that San Francisco had failed to establish the urgency that would justify such a hearing.

Joseph Martin Jr., president of the city Public Utilities Commission, said:

"This action by the CAB shows what can be accomplished when the efforts of Senators Knowland and Kuchel, and Representatives Mailliard and Shelley are joined with those of the Mayor, the Board of Supervisors, the San Francisco Chamber of Commerce, the Down Town Association, business and labor organizations and our Public Utilities Commission.

"The fact that the decision was 3-2 emphasizes that our fight is only started. The question of this vitally needed third nonstop air carrier between San Francisco-Oakland and New York will now have a full hearing before the CAB."

6 BOE 84

[SFO Chronicle
Jan 14, 1958)

S. F. Wins Hearing on New Flight

The Civil Aeronautics Board in Washington, D. C., agreed yesterday to hold a hearing on American Airlines' petition to fly nonstop between New York City and San Francisco-Oakland.

By a 3-to-2 vote, the board ruled the request be set down for "expeditious" hearing.

The decision came as sweet victory to many Bay Area political leaders and civic groups. They have long backed a third air carrier service between San Francisco and New York—particularly since American has announced it will institute jet service in January of 1959 if allowed the nonstop route.

In fact, the city sent lobbyist Donald W. Cleary on a special Washington mission in November to organize support for the hearing.

American has been seeking permission to fly nonstop from here to New York since 1953. At present it must make one stop at Chicago, Dallas or Tulsa. United Air Lines and Trans World Airlines now make the cross-country run without a stop.

The decision was applauded by Public Utilities Commission president Joseph Martin Jr., who said it "shows what can be accomplished" through a concerted local effort.

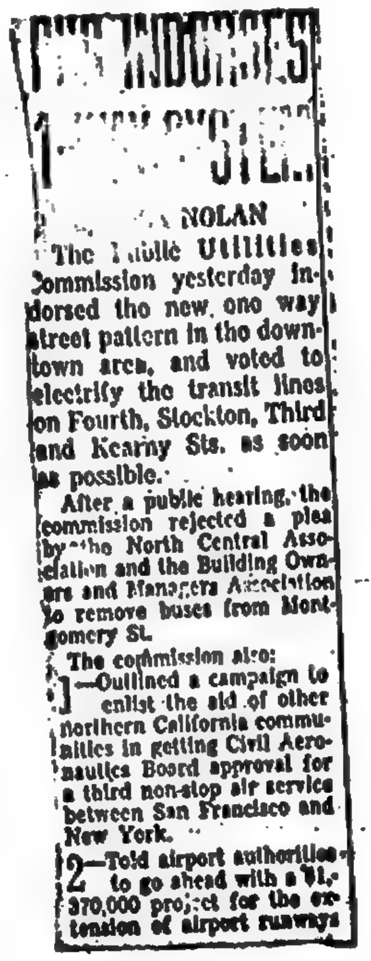
But he added "the fact that the decision was 3 to 2 emphasizes that our fight has only started."

He said the commission will consider at its meeting today what its next moves should be in pressing for the service.

BOE 90

[9124]

BOE-91



[illegible] INDORSES 1-[illegible] SYSTEM

[illegible] NOLAN

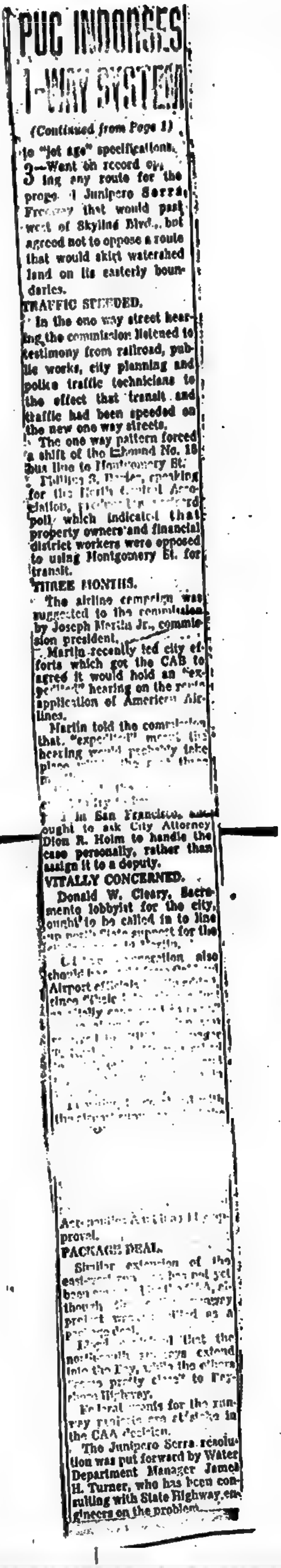
The Public Utilities Commission yesterday indorsed the new one way street pattern in the downtown area, and voted to electrify the transit lines on Fourth, Stockton, Third and Kearny Sts. as soon as possible.

After a public hearing, the commission rejected a plea by the North Central Association and the Building Owners and Managers Association to remove buses from Montgomery St.

The commission also:

1—Outlined a campaign to enlist the aid of other northern California communities in getting Civil Aeronautics Board approval for a third non-stop air service between San Francisco and New York.

2—Told airport authorities to go ahead with a $1,370,000 project for the extension of airport runways



PUC INDORSES 1-WAY SYSTEM

(Continued from Page 1)

to "jet age" specifications.

3—Went on record op[illegible]ing any route for the propo[illegible]d Junipero Serra Freeway that would pass west of Skyline Blvd., but agreed not to oppose a route that would skirt watershed land on its easterly boundaries.

TRAFFIC SPEEDED.

In the one way street hearing the commission listened to testimony from railroad, public works, city planning and police traffic technicians to the effect that transit and traffic had been speeded on the new one way streets.

The one way pattern forced a shift of the [illegible]bound No. 15 bus line to Montgomery St.

[illegible], speaking for the North Central Association, [illegible] poll which indicated that property owners and financial district workers were opposed to using Montgomery St. for transit.

THREE MONTHS.

The airline campaign was suggested to the commission by Joseph Martin Jr., commission president.

Martin recently led city efforts which got the CAB to agree it would hold an "expedited" hearing on the [illegible] application of American Airlines.

Martin told the commission that "expedited" meant the hearing would probably take place [illegible] the [illegible] three [illegible]

[illegible] in San Francisco, [illegible] ought to ask City Attorney Dion R. Holm to handle the case personally, rather than assign it to a deputy.

VITALLY CONCERNED.

Donald W. Cleary, Sacramento lobbyist for the city, ought to be called in to line up [illegible] State support for the [illegible]

[illegible] also should [illegible] Airport officials [illegible] since "their [illegible] vitally [illegible]

[illegible]

Aeronautics [illegible] approval.

PACKAGE DEAL.

Similar extension of the east-west [illegible] has not yet been [illegible] CAA, although [illegible] project [illegible] as a package deal.

[illegible] that the north-south [illegible] extend into the Bay, while the others [illegible] pretty close to Bayshore Highway.

Federal grants for the runway projects are at stake in the CAA decision.

The Junipero Serra resolution was put forward by Water Department Manager James H. Turner, who has been consulting with State Highway engineers on the problem.

[S.F. Examiner, Jan 15, 1958]

B

12

EXHIBIT NO. BOE-92
p. 1

Office of the President
FAIRMONT HOTEL
Atop Nob Hill
San Francisco

March 9, 1959

Mr. C. R. Smith
President
American Airlines, Inc.
100 Park Avenue
New York, N. Y.

Dear Mr. Smith:

In Mr. Benj. Swig's absence from the city, he has requested that I forward the enclosed letters to you.

Very truly yours,

/s/ Fran R. Wuerz

Fran R. Wuerz (Mrs.)
Office of Benj. H. Swig.

Enclosures 3

[9126]

[BOE-92, p. 2]

CLEM MILLER
* * *
CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

* * *

March 5, 1959

Mr. Benj. H. Swig, President
Fairmont Hotel
Nob Hill
San Francisco, California

Dear Mr. Swig:

Thanks very much for advising me of your interest in an additional non-stop air carrier between San Francisco and New York, and for the information as to the need and justification for this service.

I have made arrangements to testify when the Examiner's report and recommendation come before the Civil Aeronautics Board for consideration, and you may be sure that I will do my best to obtain this much needed additional service.

Very sincerely,

/s/ Clem Miller

CM:jmw

[9127]

[BOE-92, p. 3]

* * *

B. F. SISK
CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

* * *

March 5, 1959

Mr. Benj. H. Swig, President
Fairmont Hotel
Atop Nob Hill
San Francisco - California

Dear Mr. Swig:

May I acknowledge your letter of March 2, and the enclosed statement, urging support for the efforts of the City of San Francisco to obtain additional direct non-stop air transportation service between your city and New York.

I am glad to have this expression of your views, and I have already indicated my support and cooperation in the matter to Mayor Christopher and Acting Mayor Dobbs.

Sincerely,

/s/ Bernie Sisk

B. F. SISK, M.C.

BFS:e

[BOE-92, p. 4]

GEO. P. MILLER
* * *

* * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

March 5, 1959

Mr. Benj. H. Swig
Office of the President
Fairmont Hotel
San Francisco, California

Dear Mr. Swig:

I have for acknowledgment your letter of March 2, relative to the CAB hearing on the San Francisco-Oakland New York-Newark non-stop flight application filed by American Airlines.

I have worked on this matter since its inception and have arranged to appear before the Civil Aeronautics Board during the Oral Argument.

Thank you for writing me.

Sincerely,

/s/ Geo. P. Miller

GEORGE P. MILLER

GPM:js

[9129]

EXHIBIT NO. BOE-93

Shipley Vu 3/20
Taylor

Office of the President
FAIRMONT HOTEL
Atop Nob Hill
San Francisco

March 18, 1959

American Airlines, Inc.
Received
March 20, 1959
Office of President

Mr. C. R. Smith
President
American Airlines, Inc.
100 Park Avenue
New York, N. Y.

Dear Mr. Smith:

Here is original letter that I have just received from Congressman Jeffrey Cohelan regarding the establishment of a New York to San Francisco non-stop service carrier.

I am very happy to be of any assistance I can to American Airlines and please call on me at any time.

With best wishes, I am

Very truly yours,

/s/ Ben Swig

Benj. H. Swig

BHS:C
Enclosure

[9130]

[BOE-93, p. 2]

JEFFERY COHELAN
* * *
CONGRESS OF THE UNITED STATES
* * *
House of Representatives
Washington, D. C.

March 11, 1959

Mr. Benj. H. Swig, President
Fairmont Hotel
San Francisco, California

Dear Mr. Swig:

I am pleased to advise you that the Examiner in this case has recommended the establishment of a New York to San Francisco non-stop service carrier.

I am preparing to appear before the Civil Aeronautics Board with my fellow Congressmen from the Bay Area when the hearing is set.

Very truly yours,

/s/ Jeffery Cohelan

Member of Congress

JC/tg

[9131]

EXHIBIT BOE-94

Shipley

✓ File to Mr. Jacob

~~Taylor~~ / Strickler DA
& return to
Shipley

March 11, 1959

Dear Mrs. Wuerz,

Please tell Mr. Benjamin Swig that he is a wonderful guy, and that we are most grateful to him.

Sincerely yours,

C. R. Smith

Mrs. Fran R. Wuerz
Office of the President
Fairmont Hotel
San Francisco
California

WR 3/20

EXHIBIT NO. BOE-95

STATEMENT OF CLARENCE M. SHY, DIRECTOR OF AVIATION OF SAN JOAQUIN COUNTY BEFORE EDWARD D. STODOLA, EXAMINER, CIVIL AERONAUTICS BOARD

August 24, 1960

San Francisco, California

My name is CLARENCE M. SHY and I am the Director of Aviation of San Joaquin County. I have with me a prepared statement and I would appreciate the opportunity of being permitted to read my statement; at its completion I will, of course, answer any questions which you direct to me.

In a letter of Mr. Joseph A. Hamilton, Jr., Air Transport Examiner, dated July 19, 1960, directed to the Board of Supervisors of San Joaquin County, he propounded several questions with reference to the San Francisco-New York non-stop case, Docket Nos. 5903 and 9214, and relative to the resolution of the Board of Supervisors of San Joaquin County dated May 27, 1957, favoring the granting of American Airlines' motion before the Civil Aeronautics Board to sever and expedite its San Francisco-New York non-stop air carrier route application. These questions were as follows:

> 1. Did anyone on behalf of any airline or any organization or city communicate with you or request that you send this communication? If so, who and when? What did he tell you or ask of you?
>
> 2. Did anyone furnish you with data or information set forth in your communication? If so, who and when? What information did he furnish you.

On July 27, 1960, Mr. C. P. Kenyon, County Administrator of San Joaquin County, responded to Mr. Hamilton's letter and advised him that I had been the source of information for the Board of Supervisors with respect to their resolution of May 27, 1957, favoring the granting of the motion of American Airlines to sever

[9133]

and set down for immediate hearing the San Francisco-New York non-stop portion of its application in your Docket No. 5903. Mr. Kenyon's statement that I had provided the information upon which the Board of Supervisors acted by way of its resolution, is correct. As Director of Aviation of San Joaquin County, I am the adviser to the Board of Supervisors with respect to all matters relating to aviation and air transportation.

In advising my Board that a third non-stop air carrier between San Francisco and New York was desirable, I acted upon what I believed to be the best interest of our community. It was my belief that American should not be required to stop at Chicago enroute to New York, and that there was adequate traffic potential to guarantee satisfactory load factors to three non-stop air carriers to New York.

It was further my belief that such additional service would provide more scheduled departure and arrival times and would thus furnish greater convenience for those wishing to use the service. San Francisco is the normal point of departure and arrival for residents of San Joaquin County who desire to travel to or from the East. It was, therefore, felt that additional non-stop service would be of direct benefit to the residents of San Joaquin County.

It was also my opinion that in light of the fact that in 1957 Los Angeles had available three non-stop air carriers between Los Angeles and New York and that San Francisco had only two non-stop air carriers to New York, there was an unfair discrimination against Northern California, of which San Joaquin County is, of course, a part.

[9134]

With respect to the first question which Mr. Hamilton directed to the Board of Supervisors relative to whether anyone communicated with our Board and requested that they in turn communicate with the C.A.B., the Supervisors did receive communications from various persons and agencies relative to the matter of additional non-stop service between San Francisco and New York. I have with me a summary of all correspondence received or sent by San Joaquin County or its officers relative to this matter, and if it is desired by you, it is, of course, available. None of the correspondence referred to was received prior to the resolution of our Board. At some time, perhaps prior to May 27, 1957, Mr. Richard T. Dominiak, Sales Representative of American, called at my office and requested the support of San Joaquin County relative to the matter before you.

In connection with the second question which you directed to our Board, asking whether anyone furnished data or information to the Board of Supervisors which was set forth in their communication to the C.A.B., our Board was not furnished any information used in their resolution of May 27, 1957, other than information which I presented to them.

/s/ C. M. Shy

CLARENCE M. SHY
Director of Aviation
County of San Joaquin

[9135]

August 24, 1960

Stockton, California

SUMMARY OF CORRESPONDENCE OF CLARENCE M. SHY, DIRECTOR OF AVIATION, SAN JOAQUIN COUNTY, AND THE BOARD OF SUPERVISORS OF SAN JOAQUIN COUNTY RELATIVE TO CIVIL AERONAUTICS BOARD SAN FRANCISCO-NEW YORK NON-STOP CASE, DOCKET NOS. 5903 AND 9214.

Correspondence to or from the CAB or officers and employees of the CAB, and official notices from the CAB, are not included in this summary.

1. May 24, 1957	Letter from Clarence M. Shy to the Board of Supervisors of San Joaquin County requesting that the Board of Supervisors adopt a resolution relative to the granting of the motion of American Airlines, Inc. to sever and set down for immediate hearing the San Francisco-New York non-stop portion of its application in Docket No. 5903.
2. May 27, 1957	Resolution of the Board of Supervisors requesting the CAB to sever and set down for immediate hearing the San Francisco-New York non-stop portion of American Airlines, Inc. application in Docket No. 5903.
3. May 27, 1957	Resolution of the City Council of the City of Stockton favoring additional non-stop air carrier service between San Francisco and New York.
4. June 3, 1957	Letter of transmittal from the Assistant City Clerk of the City of Stockton to Clarence M. Shy, transmitting resolution of the City of Stockton dated May 27, 1957.
5. June 3, 1957	Letters of transmittal from Clarence M. Shy to American Airlines, Inc., Howard C. Westwood and John W. Douglas, Senator Thomas H. Kuchel, Senator William Knowland, and Congressman John J. McFall, transmitting copies, for information purposes, of the resolution of the Board of Supervisors dated May 27, 1957.
6. June 3, 1957	Letter from Congressman John J. McFall to Clarence M. Shy expressing thanks for copy of resolution of Board of Supervisors dated May 27, 1957, and stating that Congressman McFall was aware of the value of additional non-stop air carrier service between San Francisco and New York and that he would do what he could to be of assistance.

[9136]

7. June 7, 1957	Letter from Senator William Knowland to Clarence M. Shy forwarding report of Chairman of CAB and stating interest of Senator Knowland in additional non-stop air carrier service between San Francisco and New York.
8. June 11, 1957	Letter from M. F. Small, Administrative Assistant to Senator Kuchel, to Clarence M. Shy advising Mr. Shy that his letter had been received, and expressing Senator Kuchel's interest in the matter of non-stop air carrier service between San Francisco and New York.
9. July 26, 1957	Letter to Mr. Shy from J. E. Watkins, American Airlines, Inc., thanking Mr. Shy for his assistance by way of a statement pursuant to Rule 14 in the San Francisco-New York non-stop air carrier service hearings.
10. October 27, 1958	Letter to C. B. Bull, Chairman of the Board of Supervisors of San Joaquin County, from Mayor George Christopher, Mayor of the City and County of San Francisco, requesting the continued support of San Joaquin County with respect to the San Francisco-New York non-stop air carrier hearings, and informing Supervisor Bull that thus far at the hearings it had been pointed out that all of Northern California had suffered due to the lack of a third San Francisco-New York non-stop air carrier.
11. October 28, 1958	Letter from C. P. Kenyon, County Administrator of the County of San Joaquin, to Clarence M. Shy requesting that resolution relative to non-stop air carrier service between San Francisco and New York be prepared and stating that the Board of Supervisors had received a communication from Mayor George Christopher of the City and County of San Francisco soliciting the support of San Joaquin County.
12. November 3, 1958	Resolution of the Board of Supervisors requesting the CAB to grant additional non-stop air carrier service between San Francisco and New York

13.	November 10, 1958	Letter from Morris Shipley, Assistant Vice President, State and Community Affairs, American Airlines, Inc., to C. B. Bull, Chairman of the Board of Supervisors, expressing the thanks of American Airlines, Inc. for the resolution of the Board of Supervisors dated November 3, 1958, which had been filed with the CAB pursuant to Rule 14.

[9137]

14.	November 14, 1958	Letter from Charles C. Miller, Manager of the Transportation Department of the San Francisco Chamber of Commerce, to C. B. Bull, Chairman of the Board of Supervisors, expressing thanks for the copy of the resolution of the Board of Supervisors dated November 3, 1958, and forwarding a copy of the brief of the San Francisco Chamber of Commerce relative to the San Francisco-New York non-stop air carrier hearings which had been filed with the CAB.
15.	February 18, 1959	Letter to C. B. Bull, Chairman of the Board of Supervisors, from Harold S. Dobbs, Acting Mayor of the City and County of San Francisco, requesting the continued support of San Joaquin County relative to the San Francisco-New York non-stop air carrier hearings, and requesting that San Joaquin County urge Congressman John J. McFall to make an oral appearance before the CAB, and further requesting that copies of our correspondence relative to the matter be sent to Dion Holm, City Attorney of the City and County of San Francisco, and transmitting a list of other Northern California counties, cities, and chambers of commerce who were in support of the position of the City and County of San Francisco.
16.	February 18, 1959	Copy of letter from Harold S. Dobbs, Acting Mayor of the City and County of San Francisco, to Congressman John J. McFall requesting the assistance of Congressman McFall, pointing out the value of additional non-stop air carrier service between San Francisco and New York, and urging Congressman McFall to make an oral appearance before the CAB.

On one occasion, no memorandum of the date is available, Richard T. Dominiak, Sales Representative of American Airlines, called at Clarence M. Shy's office and discussed the matter of the San Francisco-New York non-stop air carrier hearings. Mr. Dominiak regularly called at the offices of Pacific Airlines, located at Stockton Field Airport, relative to sales matters, but only once called at Mr. Shy's office.

[9138]

EXHIBIT NO. BOE-96

May 15, 1957.

The Honorable John F Shelley
House of Representatives
Washington, D C

Dear Congressman Shelley:

We are enclosing a copy of a resolution adopted by the Down Town Association of San Francisco, directed to the Civil Aeronautics Board, strongly urging immediate consideration of American Airlines' application for non-stop service between San Francisco and New York.

We are hopeful that you will do everything possible to further this application of American.

Cordially,

Roy N Buell
President

Sent to:
The Honorable Wm F Knowland, U S Senate
Thos H Kuchel
Wm S Mailliard
John F Shelly
Herbert B Scudder
Clair Engle
John E Moss, Jr.
John F Baldwin, Jr.
John J Allen, Jr.
Geo P Miller
J Arthur Younger
Chas S Gubser
John J McFall
Goodwin J Knight
George Christopher
Jos Martin, Jr
Daniel F DelCarlo
Edw B Baron
Oliver M Rousseau
Stuart N Greenberg

[9139]

[BOE-96, p. 2]

DOWNTOWN ASSOCIATION OF SAN FRANCISCO

RESOLUTION ADOPTED BY THE
DOWN TOWN ASSOCIATION OF SAN FRANCISCO.

WEDNESDAY, MAY 8, 1957.

WHEREAS, San Francisco with one of the most modern airports in the nation and with a constantly growing demand for transcontinental non-stop air flight, still has only two air lines providing non-stop service to New York; and

WHEREAS, San Francisco generates two-thirds as much non-stop New York traffic as Los Angeles and yet has only 7 daily non-stop flights in both directions between San Francisco and New York as against 19 such daily flights between Los Angeles and New York, or 171% more than San Francisco; and

WHEREAS, San Francisco is spending its most recent $25,000,000. bond issue in part to meet the requirements of jet air liners in 1959 when the demand for non-stop New York flight will be greatly increased, and it has been the experience of San Francisco always to be behind Los Angeles in permits from the Civil Aeronautics Board for extended services; and

WHEREAS, American Airlines was denied a certificate for non-stop service between San Francisco and New York in spite of the urgent appeal of official San Francisco and its civic organizations and the Civil Aeronautics Board denied San Francisco its petition for a rehearing, and American Airlines has petitioned anew for a non-stop New York certificate;

NOW, THEREFORE, BE IT RESOLVED, that the Down Town Association of San Francisco reiterate the position it heretofore took on the petition of American Airlines, and respectfully but most earnestly urges the Civil Aeronautics Board to consider and act promptly and favorably on the most recent application of American Airlines, so that both it and the San Francisco Airport management may undertake without delay the necessary and time-consuming planning for airport facilities and air route scheduling and arrangements which must be made to meet the new requirements for jet air transport.

[9140]

[BOE-96, p. 3]

FROM: AMERICAN AIRLINES
Tom Barbour - Public Relations
1420 Russ Building
San Francisco, California
YUkon 2-4620

RELEASE AT
5PM EST FRI MAY 3

MEMO TO EDITORS

The following background information may be helpful in your coverage of Civil Aeronautics Board action pertaining to San Francisco's nonstop transcontinental airline services.

ACTION: American Airlines has requested the Civil Aeronautics Board to "sever and expedite" a certain portion of an application which has been on file for some time. The specific request pertains to the portion which asks the CAB to remove the restriction on American's transcontinental service. If granted, this would mean American would be permitted to fly from San Francisco to New York nonstop, which it is not presently allowed to do.

HISTORY: The last time the Civil Aeronautics Board considered this matter was in 1954-55 in the so-called Denver Service Case. At that time, the Board granted American the right to fly to Chicago, but not nonstop to the East Coast. The decision followed years of investigation, during which the CAB Bureau of Air Operators recommended that American be allowed to fly nonstop, and the CAB Examiner (Ferdinand Moran) also recommended that American be allowed to serve San Francisco on an unrestricted basis. However, the Board overruled both the Bureau of Air Operators and the Examiner and decided that the competitive status of the airlines serving San Francisco should not be disturbed. It is significant to note that the Board, in its ruling, did not take issue with the City's proved contention that its transcontinental service was inadequate and inferior, nor did it deny the Examiner's finding that the public interest required these additional services.

[BOE-96, p. 4] [9141]

The City of San Francisco protested, and petitioned for reconsideration, but this was denied.

Since the Denver Service Case, the inferiority of San Francisco's transcontinental service has become even more obvious, and the disparity between it and Los Angeles more marked. A fuller analysis is spelled out below in the American Airlines position.

SAN FRANCISCO POSITION: This is available from several sources; the Chamber of Commerce, (Mr. Charles Miller, Transportation Dept., EX 2-4511); from the Public Utilities Commission of the City (Mr. Virgil Elliott, HE 1-2121); and from the City Attorney's Office, which works up the City's airline route cases (Frank Needles, Deputy City Attorney for Utilities, HE 1-1322).

In general, however, the City, which now has more than $75,000,000 of public monies invested in airport facilities, resents playing second fiddle to Los Angeles, which has consistently enjoyed better airplanes first. (American Airlines has always led the industry in the introduction of more modern equipment, but must offer it only over the most competitive or economical routes.) Los Angeles also enjoys better services such as more nonstops to more cities, more frequent schedules, more convenient departure times, more through-plane service, etc. The city accuses the CAB of "discrimination" against San Francisco in the award of new routes and services.

The City also has a problem of making the airport pay, even though its rates and charges are perhaps the highest in the country, and one of the few ways in which the situation can be improved is through new services and more flights, which will result from more competition among the air carriers.

The City is also concerned about maintaining its status as the primary West Coast Port of Aerial Embarkation.

[9142]

[BOE-96, p. 5]

IMMINENCE OF JET SERVICE:

Since there are fewer than 365 working days between now and the advent of scheduled jet airliner service, the necessity for solving the city's route problems soon is critical.

American Airlines will fly the first regular jet transcontinental schedule in March of 1959, between Los Angeles and New York, perhaps as much as a full year before competitors. No plans for a similar schedule out of San Francisco have been announced because American is not authorized transcontinental nonstop service from San Francisco.

New aircraft have always had great impact on the airline services offered the public. The influence of new jet aircraft will be much greater than anything that has been introduced before: 4 hours and 47 minutes from San Francisco to New York as compared to the present 7 hours and 47 minutes with DC-7 aircraft. Jet aircraft and prop-jet aircraft will be smoother, quieter, safer, and more luxurious than anything yet known.

To participate immediately and fully in the rapidly-approaching jet era, San Francisco must prepare not only its airport facilities, but its air routes as well.

AMERICAN AIRLINES POSITION: American Airlines' contentions are very similar to those of the community, since the objectives are the same. They are as follows:

Since the CAB last considered San Francisco's transcontinental service, Los Angeles-New York nonstops have increased by 36% while San Francisco-New York nonstops have increased only 17%. The penalty imposed on San Francisco as a result of inadequate nonstop authorizations to and from New York are demonstrated by the following facts:

1. There are now 19 daily nonstops in both directions between Los Angeles and New York, but only 7 between San Francisco and New York.

[BOE-96, p. 6] [9143]

2. The Los Angeles-New York traffic is only 57% greater than San Francisco-New York traffic; yet there are 171% more nonstop flights between Los Angeles and New York than between San Francisco and New York.
3. San Francisco receives only 55% as many nonstop flights per 100 daily passengers to and from New York as does Los Angeles.
4. There are only 2.7 daily nonstop flights between San Francisco and New York per 1,000,000 population as compared with 3.4 between Los Angeles and New York.
5. San Francisco receives 0.8 total nonstop seats per daily passenger to and from New York, or only 61.5% of Los Angeles' total. (1.3 total nonstop seats per daily passenger between Los Angeles and New York).
6. San Francisco-New York nonstop coach service is also inferior and inadequate. San Francisco receives only 64% as many nonstop coach seats per daily coach passenger to and from New York as does Los Angeles.

The penalty for having inadequate nonstop authorizations to and from New York is also demonstrated by the substantial lag San Francisco has experienced in receiving new services.

1. San Francisco was 18 months behind Los Angeles in receiving nonstop standard fare service to and from New York.
2. San Francisco was 11 months behind in receiving nonstop coach service to and from New York.

There is every reason to believe that unless the disparity in authorizations between San Francisco and New York is remedied immediately, similar time lags will occur in the forthcoming jet era.

The size and importance of the San Francisco-New York market clearly entitles it to three nonstop carriers.

1. The San Francisco-New York route is the second largest passenger-mile

[9144] [BOE-96, p. 7]

market in the country, exchanging 700 passengers per day.

2. The San Francisco-New York route is the nation's largest market with only two nonstop carriers.
3. The San Francisco-New York market exchanges more passengers than many markets that now have three nonstop carriers. For example:- San Francisco-New York exchanges 44% more passengers than Los Angeles-Chicago and 72% more than Chicago-Washington, yet the latter two markets have four nonstop carriers as compared with only two between San Francisco and New York.
4. The San Francisco-New York market generates five times as many passenger miles as does the Seattle-New York market which is New York's next largest long-haul passenger-mile segment with only two nonstop carriers.
5. By the same token, New York-San Francisco is San Francisco's largest market with only two nonstop carriers generating 44 times as many passenger miles as does San Francisco-Washington, which is San Francisco's next largest passenger-mile market with only two nonstop carriers.

tb4/30/57

[9145]

EXHIBIT BOE-97

* * *

UNITED STATES SENATE
Committee on
Interior and Insular Affairs

May 20, 1957

Mr. Roy N. Buell, President
Down Town Association of
San Francisco
57 Post Street
San Francisco, California

Dear Mr. Buell:

I was glad to receive your letter of May 15, enclosing copy of the resolution adopted by the Down Town Association of San Francisco on May 8, 1957, relative to the application of American Airlines for establishing additional non-stop air service between San Francisco and New York. I have submitted it to the Civil Aeronautics Board in connection with its consideration of the application.

With my best wishes, I am

Sincerely,

/s/ Thomas H. Kuchel

THOMAS H. KUCHEL
United States Senator

K:Sr

[9146]

[BOE-97, p. 2]

* * *

WILLIAM S. MAILLIARD
CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

Br file

21 May 1957

Mr. Roy N. Buell, President
DOWN TOWN ASSOCIATION
57 Post Street
San Francisco, California

Dear Mr. Buell:

Congressman Mailliard, as you doubtless know, is in San Francisco for the World Trade and Maritime week observances; therefore, I am responding to your letter of May 15, enclosing the Association's resolution relative to additional non-stop air service between San Francisco and New York.

Your letter and those of several others who have written Mr. Mailliard on this matter of such importance to San Francisco have been brought to the attention of the Chairman of the Civil Aeronautics Board.

You know, of course, of the Congressman's continuing interest in the growth of San Francisco as a major air terminal; and CAB officials are thoroughly familiar with his representations urging that the City's requests for additional service and expanded facilities receive consideration comparable with that given other cities as strategically located.

I will bring this correspondence to the Congressman's attention upon his return to Washington, and I know that he will be appreciative of your courtesy in providing him with the Association's views on this matter.

With best wishes,

Sincerely,

/s/ Mildred A. Oulicky

Miss Mildred A. Oulicky
Secretary to
Congressman Mailliard

[9147]

HUBERT B. SCUDDER [BOE-97, p. 3]

* * * * * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

May 21, 1957

Mr. Roy N. Buell, President
Down Town Association
57 Post Street
San Francisco, California

Dear Mr. Buell:

I have your letter of the 15th enclosing a resolution adopted by the Down Town Association of San Francisco, directed to the Civil Aeronautics Board, urging immediate consideration for American Airlines application for non-stop service between San Francisco and New York.

I have discussed this matter with officials of the C.A.B. They advise that the statutory time limit within which objections may be filed does not expire until May 28th, so naturally they can take no action until after this date. I have expressed my interest in the case and am today writing Mr. Durfee, Chairman of the Board, advising him of my interest and requesting that I be kept advised. I will continue to keep in touch with the matter.

Assuring you of my desire to cooperate with you and with best wishes, I am

Sincerely yours,

/s/ Hubert B. Scudder

HBS/gls

[9148]

[BOE-97, p. 4]

JOHN F. BALDWIN
* * *
CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

* * *

May 22, 1957

Mr. Roy M. Buell, President
Downtown Association of San Francisco
57 Post Street
San Francisco, California

Dear Mr. Buell:

Thanks very much for your kind letter of May fifteenth. It is thoughtful of you to enclose a resolution urging immediate consideration of American Airlines' application for non-stop service between San Francisco and New York. I have already received several letters upon this subject, and have written the Civil Aeronautics Board urging a prompt hearing upon this application.

With kindest regards,

Sincerely yours,

/s/ John F. Baldwin

JOHN F. BALDWIN
Representative in Congress
Sixth District

jfb:m

[9149]

[BOE-97, p. 5]
CLAIR ENGLE

* * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

* * *

May 22, 1957

Mr. Roy N. Buell
President
Down Town Association
57 Post Street
San Francisco, California

Dear Mr. Buell:

This is to acknowledge receipt of your letter of May 15, together with the resolution adopted by your Association.

I appreciate very much your bringing this to my attention and can assure you of my cooperation, along with other members of the California Congressional Delegation.

Sincerely yours,

/s/ Clair Engle

CLAIR ENGLE, M.C.

ark

[9150]

[BOE-97, p. 6]

* * *

UNITED STATES SENATE
Committee on Appropriations

No file

May 23, 1957

Dear Mr. Buell:

Your letter of May 15 has been received and I greatly appreciated your forwarding to me a copy of the resolution adopted by the Down Town Association of San Francisco regarding American Airlines' application for non-stop service between San Francisco and New York.

I have contacted the Chairman of the Civil Aeronautics Board and have requested a status report on this application. You may be certain that it will continue to receive my close and personal attention.

With kind personal regards, I remain

Sincerely yours,

/s/ William F. Knowland
William F. Knowland

Mr. Roy N. Buell
President
Down Town Association
57 Post Street
San Francisco, California

[9151]

[BOE-97, p. 7]

JOHN F. SHELLEY
* * *
CONGRESS OF THE UNITED STATES
* * *
House of Representatives
Washington, D. C.

May 28, 1957

Mr. Roy N. Buell
President
Down Town Association
of San Francisco
57 Post Street
San Francisco, California

Dear Roy:

This will acknowledge receipt of the Resolution passed by the Down Town Association on Wednesday, May 8, urging the Civil Aeronautics Board to consider and act promptly and favorably on the most recent application of American Airlines to sever and expedite a hearing on that portion relating to the nonstop American Airlines New York-San Francisco service.

Enclosed with this letter is a copy of my letter to each of the members of the Board requesting an immediate hearing on this matter and expressing my vital interest in the motion of American Airlines, Inc. I have been conferring with representatives of the airlines here in Washington and am in close touch with the situation. As soon as I hear further from the Board, I will advise you.

With kind personal regards, I am

Sincerely yours,

/s/ Jack Shelley

M.C.

h

[9152]

JOHN F. SHELLEY [BOE-97, p. 8]

* * * * * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.
May 27, 1957

Mr. James R. Durfee, Chairman
Civil Aeronautics Board
Washington, D. C.

Dear Mr. Chairman:

This letter is addressed to you in connection with the motion of American Airlines, Inc. to sever and set down for immediate hearing the San Francisco-New York nonstop portion of its application in Docket No. 5903.

In this request for an immediate hearing before the Civil Aeronautics Board on this part of the American Airlines application, I believe the company is fully justified in asking for a hearing in view of developments since the time of the original hearings and particularly in view of the fact the Board did not pass upon the question of whether there was a need for an additional non-stop carrier in the market. San Francisco on a national basis is the most important air market with only two nonstop carriers between New York and San Francisco. As one who travels quite a bit between the East Coast and San Francisco, I understand this lack of service personally and the effect it has on passengers wishing to make a quick and convenient trip between San Francisco and New York.

I trust the Board will see fit to at least grant the petitioner, American Airlines, Inc., an immediate opportunity to be heard on this matter and that when the Board does set this for hearing, you will notify me of the time and place where it will take place. I am very vitally interested in the matter of inadequate service now being offered to air travelers between the two cities and would like to add that I would be happy to meet with you and the other members of the Board at any time to discuss this situation with you.

In the knowledge you will give this request your earnest consideration and as a native San Franciscan and Representative of San Francisco in the Congress, I know you will give my letter your prompt consideration.

Sincerely yours,

M.C.

[9153]

[BOE-97, p. 9]

WILLIAM S. MAILLIARD
* * *

* * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

29 May 1957

Mr. Roy N. Buell, President
DOWN TOWN ASSOCIATION
57 Post Street
San Francisco, California

Dear Roy:

I have now received a reply to my expression of interest from the CAB relative to the City's representations favoring approval of CAB Docket No. 5903, American Air Lines application for nonstop service between San Francisco and New York.

A copy of Chairman Durfee's letter, responding to my request for expeditious consideration of this application, is enclosed for your information.

I will keep you informed of any additional information that may be furnished me by the Civil Aeronautics Board.

With best wishes,

Sincerely,

/s/ Bill

Member of Congress

WSM/mao

Enclosure

[9154] [BOE-97, p. 10]

COPY

CIVIL AERONAUTICS BOARD
Washington 25

May 27, 1957

Honorable William C. Mailliard
House of Representatives
Washington, D. C.

Dear Congressman Mailliard:

This will acknowledge your letter of May 21, 1957, enclosing correspondence to you with reference to the request of American Airlines for establishment of nonstop service between New York and San Francisco in Docket No. 5903.

American Airlines has filed a motion with the Board urging an expedited hearing on its application which would make possible such a service. Answers to this motion are due on May 28, 1957, and the matter will then receive the Board's most careful consideration.

In view of your interest, instructions have been given that you be advised of the Board's action in connection with this motion.

We are returning your correspondence herewith.

Sincerely yours,

/s/ JAMES R. DURFEE

Chairman

Enclosures: (4)

COPY

[9155]

[BOE-97, p. 11]

* * *

JOHN E. MOSS

* * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

May 31, 1957

Mr. Roy N. Buell
President
Down Town Association of
San Francisco
57 Post Street
San Francisco, California

Dear Mr. Buell:

Thank you for sending me a copy of the resolution adopted by the Down Town Association of San Francisco concerning American Airlines' application for non-stop service between San Francisco and New York.

I appreciate your furnishing me with this information.

Sincerely,

/s/ John E. Moss

John E. Moss
Member of Congress

JEM:a

[9156]

[BOE-97, p. 12]

* * *

GEORGE P. MILLER
* * *
CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

June 3, 1957

Mr. Roy N. Buell
President
Down Town Association
57 Post Street
San Francisco, California

My dear Mr. Buell:

Thank you very much for your letter, enclosing a copy of a resolution adopted by the Down Town Association of San Francisco, relative to American Airlines' application, now pending, with the Civil Aeronautics Board to initiate non-stop service between New York and the Bay Area.

Quite sometime ago I approached CAB and made my position on this subject known to them.

It is long overdue and I am hopeful that CAB will grant the request to American in a very short time.

Sincerely,

/s/ Geo. P. Miller

GEORGE P. MILLER

GPM:Dcf

[BOE-97, p. 13] [9157]

JOHN F. SHELLEY
* * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

June 3, 1957

The Honorable George Christopher
Mayor of the City and County
of San Francisco
200 City Hall
San Francisco, California

Dear George:

This is in reply to your letter inviting me to attend the dedication ceremonies for the comprehensive model of the San Francisco Bay on the afternoon of June 14. I have been hopeful that the schedule of legislative business here in Congress would be such that I could make the trip out for these ceremonies. However, it now appears that immediately following the consideration of H.R. 6172, the civil rights bill of 1957, the House will then consider Federal aid to Education. In addition to these matters, I am continuing to work on the CAB to grant a hearing on the American Airlines nonstop San Francisco-New York application. This schedule, I'm afraid, makes it impossible for me to join with my many friends out there in the Bay Area who will be gathering together on this occasion to dedicate the Bay Model. After appearing on several occasions before Committees of Congress in support of appropriations for this project and helping to guide the study to a successful endorsement and authorization by Congress, it is a great disappointment to me that the legislative schedule prevents me from being there on June 14.

By means of this letter, I would like to join in commending the Army engineers and others responsible for their vision and farsightedness in bringing this vital project to a successful conclusion and providing the people of the Bay Area and Northern California with a device that can bring better living, greater economic and industrial development and a sound utilization of our water resources to the citizens of the area. This study, which I humbly think of as a "pet project", is truly a remarkable feat.

With kind personal regards, I am

Sincerely yours,

M.C.

cc: Mr. John Reber
Mr. George Johns
Mr. E. D. Maloney
Mr. Roy Buell

h

[9158]

[BOE-97, p. 14]

J. ARTHUR YOUNGER

* * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

June 8, 1957

Dear Mr. Buell:

Attached is a copy of a letter just received from the Civil Aeronautics Board which is self-explanatory.

I shall continue to keep you advised.

Cordially yours,

/s/ Art

J. Arthur Younger, M.C.
9th District, California

Mr. Roy N. Buell, President
Down Town Association
57 Post Street
San Francisco, California

JAY:vr
Enclosure

[9159]

[BOE-97, p. 15]

COPY

CIVIL AERONAUTICS BOARD
WASHINGTON 25

JUNE 5, 1957

Honorable J. Arthur Younger
House of Representatives
Washington, D. C.

Dear Congressman Younger:

This will acknowledge your letter of May 27, 1957, urging the Board to assign a prompt hearing on the application of American Airlines in Docket No. 5903 to provide nonstop service between San Francisco and New York.

American has filed a motion requesting expeditious hearing on its application which will make possible nonstop service between New York and San Francisco. Answers have been filed to this motion by a number of parties and the matter is now before the Board for consideration.

Your interest and the interest of San Francisco in the request of American for an expeditious hearing is appreciated and you can be sure that most careful consideration will be given to the contentions advanced by all interested parties.

In view of your interest, instructions have been given that you be advised of the Board's action on this request.

Sincerely yours,

James R. Durfee

Chairman

COPY

[9160] [BOE-97, p. 16]

JOHN J. ALLEN, JR.

* * *

* * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

Bo file

June 11, 1957

Mr. Roy N. Buell, President
Down Town Association of
San Francisco
57 Post Street
San Francisco, California

Dear Mr. Buell:

In further reference to your letter of May 15th concerning American Airlines' application for non-stop service between San Francisco and New York, I enclose a copy of a letter which I received from the Chairman of the CAB in answer to my inquiry on your behalf.

I trust this information will be of assistance to you.

With kindest regards.

Cordially yours,

/s/ John J. Allen, Jr.
John J. Allen, Jr.

JJA/hg-3
85/22-28

[9161]

[BOE-97, p. 17]

CIVIL AERONAUTICS BOARD
WASHINGTON

JUNE 4, 1957

Honorable John J. Allen
House of Representatives
Washington, D. C.

Dear Congressman Allen:

This will acknowledge your letter of May 28, 1957, enclosing a letter to you from the Down Town Association of San Francisco with a copy of a Resolution urging immediate consideration of American Airlines' application for nonstop service between San Francisco and New York.

American has filed a motion requesting expeditious hearing on its application in Docket No. 5903 which will make possible nonstop service between New York and San Francisco. Answers have been filed to this motion by a number of parties and the matter is now before the Board for consideration.

Your interest and the interest of San Francisco in the request of American for an expeditious hearing is appreciated, and you can be sure that most careful consideration will be given to the contentions advanced by all interested parties. In view of your interest, instructions have been given that you be advised of the Board's action on this request.

In accordance with your request, your correspondence is returned to you herewith.

Sincerely yours,

/s/ James R. Durfee

Chairman

Enclosure: (1)

[9162] [BOE-97, p. 18]

WILLIAM S. MAILLIARD
* * * * * *
CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

27 June 1957

Mr. Roy N. Buell, President
DOWN TOWN ASSOCIATION
57 Post Street
San Francisco, California

Dear Roy:

This morning I was furnished a copy of CAB Order No. E-11493, denying the motion of American Airlines for an expedited hearing on Docket No. 5903.

I sincerely regret that it was not possible to secure a more favorable decision on the Motion now; however, I was assured that it is the Board's intention to reconsider its decision on or about December 1. In view of the allegations contained in the petition and supporting documents, the Board has directed the staff to review the problem of the air service pattern between New York and San Francisco and report the results of that study to the Board so that it may examine the public need for an early hearing on the issue of nonstop service.

Informally, I was advised that failing a favorable decision in December, Docket No. 5903 might reasonably be expected to come before the CAB in its regular turn late next summer, and it was estimated that about twelve to eighteen months would elapse thereafter before a final decision might be rendered.

I assure you that I will continue my interest in effecting an early and favorable resolution of the matter.

With best wishes,

Sincerely,

/s/ Bill

Member of Congress

WSM/mao

[BOE-97, p. 19] [9163]

WILLIAM S. MAILLIARD

* * *

* * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

COPY

Br File

July 16, 1957

Mr. James R. Durfee, Chairman
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Durfee:

Your Order Denying Motion for Expeditious Hearing in the matter of the application of American Airlines, Inc. for the removal of a restriction on route No. 4, Docket No. 5903, has been received.

I would like to go on record as being extremely disappointed in the Board's decision on the motion of American Airlines, Inc. for expeditious hearing on its case to authorize it to provide nonstop service between New York/Newark and San Francisco/Oakland.

I am hopeful that when this matter is considered further in December, the Board will see fit to undertake favorable action on the motion of American Airlines, Inc. which is of utmost importance to the City of San Francisco in its struggle for domestic trade and world air routes.

With best wishes,

Sincerely

Member of Congress

WSM:JSE

EXHIBIT NO. BOE-99

OAKLAND CHAMBER OF COMMERCE
1320 Webster St.
Oakland 12, Calif.

May 14, 1957

SPECIAL NOTICE TO EXECUTIVE COMMITTEE,
OAKLAND CHAMBER OF COMMERCE AVIATION COMMITTEE

In the interest of conserving your time and avoiding a meeting on a matter on which the Committee has previously acted, I am taking the liberty of requesting a mail poll of members of the committee on the following:

You will recall that in the Denver Service Case a year and a half ago, we heard and went on record in support of American Airlines' request for route revisions and extensions that would permit it to operate non-stop flights between the Bay Area and New York. In the Denver Service Case decision, the Civil Aeronautics Board restricted American to a Chicago stop on its transcontinental operations.

American has now reinstituted its request to the Civil Aeronautics Board for the proposed Bay Area-New York non-stop service and at an informal luncheon meeting yesterday, it's representatives stated that the need for such service by residents and business firms on both sides of the Bay, has increased immeasurably and that the jet transportation to be inaugurated by American next year, makes such operation an absolute necessity.

While no immediate non-stop transcontinental service is promised for Oakland, the benefits will carry to our citizens and businesses and the service would place the entire Bay Area in a better competitive position with Los Angeles, according to the American officials.

American now asks us simply to request the Civil Aeronautics Board to hold an immediate hearing on its application for the non-stop transcontinental service, and if such action is endorsed by our committee and approved by the Chamber Board of Directors, to so advise individual members of the Civil Aeronautics Board and members of the Congressional delegation.

We have been advised that the Port of Oakland is taking appropriate action in support of American in this connection.

[9164]

Enclosed is a postcard ballot. Please fill out and mail it at your earliest convenience.

Thank you.

James R. DeKorne, Chairman
Aviation Committee

JRD:LMC
Enc.

[9165]

EXHIBIT NO. BOE-100

Aviation

January 13, 1958

MEMORANDUM TO: W. A. Sparling

FROM: Howard Waldorf

SUBJECT: Civil Aeronautics Board Hearing on Bay Area-New York Non Stop

Jack Watkins and G. Elmo Coon of American Airlines, called to advise that thanks to the support given by the Oakland Chamber of Commerce and the Port of Oakland, the Civil Aeronautics Board has granted an immediate hearing on American's application to operate non-stop service between the Bay Area and New York.

They will call again as soon as the dates are set.

Howard Waldorf

HW:LMC

[9166]

EXHIBIT NO. BOE-101

SUGGESTED LETTER TO CONGRESSMEN COHELAN AND MILLER:

Please be advised that the Oakland Chamber of Commerce is an intervenor in support of American Airlines in the New York-San Francisco Non-Stop Case, now awaiting an Examiner's decision, and oral argument before the Civil Aeronautics Board.

While no immediate service to Metropolitan Oakland International Airport is planned, the Oakland Chamber of Commerce feels that a third non-stop transcontinental carrier is vital to the San Francisco Bay Region to preserve the advantages of the Golden Gateway to the Pacific Ocean Area and the Orient, and to overcome some of the multi-carrier and first-use-of-new-airliners the Los Angeles area has enjoyed.

American Airlines has served the Metropolitan Oakland International Airport and has indicated that the Oakland Mainland area is in line for direct jet transport service in the not too distant future.

We believe that the removal of the Chicago stop restriction on American's Bay Area-New York service and its authorization to operate non-stop service between these two points is important to the business and industry and overall progress of the Oakland Mainland area.

Kind regards.

cc: Admiral Murrey Royar

[9170]

EXHIBIT NO. BOE-103

Trans. File

AMERICAN AIRLINES
1440 ~~1420~~ BROADWAY · OAKLAND 12, CALIFORNIA

Civil Aeronautics Bd
14th Street Between
E + Constitution Ave
Washington D.C.

May 17, 1957

Mr. Melvin L. Dykes
Executive Vice President and Manager
Vallejo Chamber of Commerce
315 Maryland
Vallejo, California

Dear Mr. Dykes:

In response to your request, we are pleased to forward information regarding the application of American Airlines, Inc., under Section 401 of the Civil Aeronautics Act, as amended, for an amendment to its certificate of public convenience and necessity for the transportation by air of persons, property, and mail on Route Number 4.

1. The docket number of the application is 5903.

2. The immediate motion requests the Civil Aeronautics Board to immediately sever and set down for hearing that portion of docket number 5903 whereby San Francisco would be afforded a third non-stop air service to New York.

3. The motion affects the Northern California area in this respect: there are two carriers presently authorized to provide non-stop service from the Northern California area, via the San Francisco Airport, to New York; there are three carriers, one of which is American Airlines, authorized to provide this service from Southern California, via the Los Angeles Airport, to New York. The Northern California area was 18 months behind the Southern California area in receiving non-stop, standard-fare service to and from New York, and 11 months behind in receiving non-stop coach service. In both cases the prior service was inaugurated by American Airlines in the Southern California area; American Airlines was unable to provide similar service at the same time to the Northern California area because it did not have authorization for a non-stop route from Northern California to New York. Further comparison today shows that the Southern California area has a total of 19 daily New York non-stops, while Northern California has only seven.

The shortcomings will probably be accentuated when American Airlines takes initial delivery of commercial jet transports in the latter part of 1958, unless the Northern California-New York nonstop route authorizations are equalized with the Southern California - New York routes.

[9171]

4. A request by the Vallejo Chamber of Commerce for "severing and expediting" docket number 5903 in no way supports the position of American Airlines in the route case itself, but simply puts the Vallejo area on record in behalf of its own interests.
5. Any communication from the Vallejo Chamber of Commerce to the Civil Aeronautics Board as such should be transmitted as an original, plus 19 copies.
6. Individual communication with the members of the Civil Aeronautics Board may be made by single copies of individual letters. The members of the Board are: James R. Durfee, Chairman, Chan Gurney, Vice Chairman, Harmar D. Denny, Member, G. Joseph Minetti, Member, and Louis J. Hector, Member.

If we can assist you with further information, please let us know.

Sincerely yours,

AMERICAN AIRLINES, INC.

/s/ Dick Dominiak

R. T. Dominiak
Sales Representative

RTD:mha

[9219]

EXHIBIT NO. TWA-R1

AFFIDAVIT

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

JAMES L. EDWARDS, being duly sworn deposes, and says:

I am employed by Trans World Airlines, Inc. at New York, N. Y. as a sales representative. On June 30, 1960, at the request of counsel for TWA, I visited the office of the Hon. Stuyvesant Wainwright, Representative for the First Congressional District of New York in the New House Office Building, Room 1317. The purpose of my visit was to inquire concerning the circumstances surrounding the sending by Rep. Wainwright of a letter to the Civil Aeronautics Board, dated April 28, 1959, with respect to the San Francisco-New York Nonstop Service Case, Docket No. 9214, et al.

I discussed this matter with one Mr. Ralph A. Patterson, Executive Assistant to Rep. Wainwright, who made available to me the office file on Docket No. 9214, et al. I examined therein a draft of a letter identical in content with that sent to the Board. This draft bore the legend across the top of the first page "send to all Board members". Mr. Patterson advised me that this draft in its then-existing form had been left with him by an employee of American Airlines, Inc., whose identity he does not recall, with the request that a letter substantially in the form of the draft be sent to each Board member. This occurred shortly before the letter was sent.

James L. Edwards
James L. Edwards

Sworn to before me this
26th day of September, 1960

Gustave Foehring
Notary Public

Stamped: Gustave Foehring, Notary Public, State of New York No. 24-6344500 Qualified in Kings Co. Cert. filed in New York County Commission expires March 30, 1962

[10075]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

In the Matter of)
REOPENED NEW YORK-SAN FRANCISCO) Docket No. 9214 et al.
NONSTOP SERVICE CASE)

BRIEF FOR THE UNITED STATES, AMICUS CURIAE

The United States, Amicus Curiae in the above proceeding, did not file exceptions to the Initial Decision of Examiner Edward T. Stodola, believing that questions as to the validity of his findings of fact could best be left to the parties more directly involved in the proceeding. Our failure to do so, however, is not to be taken as necessarily agreeing with any specific finding, or disagreeing with the exceptions which have been filed by the various parties. The United States believes, however, that it can best be of assistance to the Board by filing this brief outlining our views on some of the more significant questions of law and policy implicit in this proceeding and in the examiner's opinion.

At the outset we note that, regardless of the outcome of this reopened proceeding, the hearing has achieved an important objective by focusing attention, in the context of a comprehensive factual record, upon the unfortunate manner in which these important route cases have all too frequently been prosecuted by interested carriers and communities. We note with approval the significant rule making actions already consummated or initiated by the Board to preclude recurrence of such pressure campaigns in the future. For activities of the type revealed on this record clearly have tended to negate at least the appearance of fairness in Board proceedings, even though we have no reason to disagree with the Board's original determination, as now reaffirmed by the Ex-

[10077]

aminer, that the Board members have made every effort to avoid being prejudiced thereby. The trouble, of course, is that there is no real way to determine whether these actions calculated to bring editorial and Congressional pressure upon the agency may not have had an unconscious effect upon the Board's decisions.

Insofar as the merits of the present case is concerned, the United States believes:

1. The Examiner clearly erred in his treatment of American Airlines' activities to the extent that he failed to conclude that the violations of the Commission's rules he found (see e.g., Initial Decision p. 166) should not have been given a comparative demerit in its comparative contest with the application filed by Northwest Airlines. It does not suffice to discuss this comparative feature of the case with the footnote statement on page 68 of the decision that "Northwest followed a policy similar to that of American in providing information to the press on the merits of the non-stop issue" (Id. p. 67, n. 53). For there are no findings supporting this conclusionary statement and no evidence upon which such a finding could lawfully be made. To the extent that the absence of evidence and findings as to Northwest reflects an erroneous determination by the Examiner as to the proper scope of the proceedings (Tr. 136) this may justify a remand to the Examiner for further evidence on this question. Or the Board on its own motion may wish to conduct such an inquiry. But on this record one of two parties to a comparative hearing, American, has been found to have engaged in specific conduct violative of the Board's Principles of Practice. Northwest has not, or at least could not properly be so found. Accordingly, even if it be assumed that American's activities were not disqualifying, the Examiner's conclusions IV and V are invalid to the extent they hold that the record "fails to provide sufficient reason or justification for voiding or rescinding or setting aside * * * the order of certification made to American "(Con-

clusion IV, Id. pp. 185-186) and that the violation on the part of American "did not vitiate the non-stop proceedings" (Conclusion V, Id. p. 186). We submit that, unless the Commission concludes American did not violate its Principles of Practice in any respect, it is obligated to set aside its previous order and to re-evaluate the comparative qualifications of American and Northwest. Moreover, upon such new evaluation it must weigh American's derelections against it. See WHDH, Inc., 29 F.C.C. 204.[1] For it is perfectly clear that in the aviation field a prospective certificate holder's penchant for compliance with the Board's regulations are relevant to its qualifications to hold a certificate. See Great Lakes Airlines v. Civil Aeronautics Board, Case No. 15,015, C.A.D.C. decided February 24, 1961. And even where conduct is not completely disqualifying it may be a determinative factor in choosing between two or more qualified applicants where the public convenience and necessity will only justify certification of one of the applicants.

2. We agree with a number of the parties who have filed exceptions to the apparent holding of the Examiner that conduct violative of Board rules or regulations can be excused or justified because the Examiner believes other parties in other cases may have acted even more improperly. Conduct of parties in other proceedings, to the extent it is properly made part of the record, may be relevant in determining whether a particular type of activity does or does not come within the recognized pro-

cesses of administrative practice or even whether it is or is not violative of a particular rule, not clear on its face. But if, as a matter of fact, activity by a party to a Board proceeding violates the Board's rules, or accepted procedures before the agency, it is not to be excused because others, too, may have failed to comply or have been guilty of even greater transgressions. The seriousness of a particular violation - whether it should be held to be disqualifying or merely a comparative demerit - similarly should be calculated upon the basis of an evaluation of its significance in the particular case, not by comparison with conduct in other cases where no such issue was raised and no determination of the conduct's lawfulness or impropriety made.

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[1] The FCC determination in the WHDH case to hold a new comparative hearing where it found that the winning party's conduct, although not disqualifying, was improper, was expressly approved by the court of appeals by order of January 16, 1961. (Unreported order in Massachusetts Bay Telecasters v. Federal Communications Commission, Case No. 13,896, C.A.D.C.)

3. The Examiner's discussion at page 184 of the Initial Decision of the FCC ex parte contact cases and of the alleged distinctions between the problems facing the Board and those confronting the Commission is, we believe, misguided. It may be that there is a distinction between direct efforts to influence a Commissioner, as was present with respect to some of the parties in both of the FCC cases to which the Examiner refers, and the more indirect pressures engaged in by American and City of San Francisco here. But the Examiner is apparently unaware of the fact that in the WKAT case the Commission found one applicant, North Dade Video, absolutely disqualified, because, although there was no evidence that any representative of North Dade had spoken to any Commissioner after the case was set for hearing, North Dade's principals had employed a man to use his influence with Congress to do whatever he could to secure a grant for North Dade and "neutralize the pressures" allegedly being brought by the other parties. See WKAT, Inc., 29 F.C.C. 216. The Commission thought the vice of North Dade's conduct (which it held to be disqualifying) was its intent rather than what it actually achieved.

But regardless of the factual distinctions or similarities in the conduct of the parties in the FCC cases and the conduct revealed here, we cannot agree with the Examiner's startling conclusion that propriety of conduct is less important with respect to Board proceedings than before the Commission. Of course it is of great importance in the communications field. But no one has ever previously suggested that it is applicable only to "new and untried applicants." On the contrary the Commission has held that a licensee who has otherwise operated for many years in the public interest may be completely disqualified for conduct violative of its rules or otherwise outside of the recognized processes of administrative proceedings. See Federal Communications Commission v. WOKO, Inc., 329 U.S. 223; Federal Communications Commission v. Broadcasting Service Organization, 337 U.S. 901, reversing 177 F. 2d 1007 (C.A.D.C.); WKAT, Inc., 29 F.C.C. 216 (disqualification of long time radio licensee WKAT); WHDH, Inc., 29 F.C.C. 204) (voiding grant to long time radio licensee WHDH). Conceivably there may be circumstances where the needs for air service are so great, and the untainted applicants for such service so few, that conduct which would not otherwise be tolerated, would be overlooked. See Hawaiian Intraterritorial Service, 10 C.A.B. 62, 67. But there is no suggestion that this is the case here where, in addition to the non-stop service already being provided by United and TWA, there was another qualified applicant, Northwest, seeking to provide the service in question. In short we believe it would be quite erroneous (as well as totally unnecessary) for the Board's decision here to be based upon any assertion of the relative unimportance of applicants before it conforming to proper standards of conduct and complying with its pro-

cedural rules. Certainly it would go a long way towards vitiating the effect of the Board's current rule making activities in the field.

Respectfully submitted.

LEE LOEVINGER,
Assistant Attorney General

RICHARD A. SOLOMON,
Attorney
Department of Justice

[Certificate of Service]

[10103]

BRIEF OF ENFORCEMENT ATTORNEY TO THE BOARD

* * * * *

[10143]

V. SUMMARY OF THE EVIDENCE

The record in this case leaves no doubt that American Airlines and the City and County of San Francisco, individually and in concert, must assume responsibility for ex parte communications received by Board during the course of the Nonstop Case from the following sources, namely, the City and County of San Francisco, Chambers of Commerce, County Governments, travel agents, California State Officials, Senators and Congressmen, and the White House. In addition, American and San Francisco must assume responsibility for the ex parte Conference held with the Board in December, 1957.

As hereinbefore discussed, such communications were and are clearly in violation and contravention of the Board's Principles of Practice.

VI. CONCLUSIONS

In view of the entire record in this case, we submit that, if the integrity of the Board's processes are to be preserved, the Board find:

1. That American Airlines, Inc., individually and in concert with the City and County of San Francisco, violated the Board's Principles of Practice;

[10144]

2. That such violations adversely affect the fitness to perform the air transportation awarded American Airlines, Inc. by Board order E-14412;

3. That such award should be vacated and set aside subject to such further proceedings which the Board may deem warranted in the circumstances.[6]

Respectfully submitted,

W. Archer Royall
Attorney
Bureau of Enforcement

Washington, D.C.
April 18, 1961

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[6] Since the Bureau of Enforcement was not a party of the original licensing proceeding but only a party to the reopened phase to determine if the Board's Rules had been violated, we express no opinion as to the extent to which American's fitness is impaired. Since we did not participate in the licensing proceeding, we would be presumptuous to pass upon qualifications of the applicants as they relate to overall fitness. As heretofore stated, however, we assert that, at the very minimum, the Board, in light of the violations, is now required to vacate and set aside the award and reevaluate the comparative fitness of the applicants.

* * * * *

[Filed April 2, 1962]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,414 SEPTEMBER TERM, 1961

United Air Lines, Inc.,
Petitioner,

v.

Civil Aeronautics Board,
Respondent,

American Airlines, Inc.,
City and County of San Francisco,
Intervenors.

No. 15,415

Trans World Airlines, Inc.,
Petitioner,

v.

Civil Aeronautics Board,
Respondent,

American Airlines, Inc.,
City and County of San Francisco,
Intervenors.

Before: Wilbur K. Miller, Chief Judge, and Danaher and Bastian, Circuit Judges, in Chambers.

ORDER

On consideration of the notification herein of March 21, 1962 of the completion of the proceedings before the Civil Aeronautics Board pursuant to the Court's order of remand of May 19, 1960 and of petitioner's accompanying motion for the establishment of further procedural steps before the Court, and it appearing that counsel for respondent and the intervenors concur in petitioners' motion if the Court desires further briefing and argument, it is

ORDERED by the Court that petitioners may file amended petitions for review and shall specifically show in their amended petitions for review the allegations of error which will constitute issues on the further review proceedings before this Court, and that further prehearing conference herein shall be dispensed with.

1. The briefs and the joint appendix to briefs shall be prepared and served in the manner specified in the prehearing conference stipulation heretofore approved herein by the Court's order of December 15, 1959; provided, however, that to the extent that reliance may be placed on matters heretofore printed in the prior joint appendix, the parties may make reference to such prior joint appendix and need not reprint such materials.
2. The briefs of petitioners shall be served and filed by April 19, 1962, the briefs of the respondent and intervenors shall be served and filed by May 19, 1962, any reply briefs by petitioners and the joint appendix shall be served and filed by May 31, 1962, and the case shall be assigned for oral argument thereafter at such time as meets the convenience of the Court; and
3. This order shall be printed in the joint appendix and control further proceedings in this case.

Per Curiam.

Dated: April 2, 1962

SUPPLEMENTAL JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15,414

UNITED AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 31 1962

Joseph W. Stewart
CLERK

NO. 15,415

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

PETITION FOR REVIEW OF ORDER OF THE
CIVIL AERONAUTICS BOARD

Record Pages 9627 thru 10474

SUPPLEMENTAL JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15,414

UNITED AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

NO. 15,415

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

PETITION FOR REVIEW OF ORDER OF THE
CIVIL AERONAUTICS BOARD

Record Pages 9627 thru 10474

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9527

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

REOPENED NEW YORK-SAN FRANCISCO NONSTOP

SERVICE CASE

DOCKET 9214 ET AL.

In the matter of the Reopened New York-San Francisco Nonstop Service Case.

INITIAL DECISION OF EDWARD T. STODOLA, HEARING EXAMINER

Served: FEB 20 1961

Upon:

Howard C. Westwood, 701 Union Trust Building, Washington 5, D.C., for American Airlines, Inc.

Henry P. Bevans, 25 Broadway, New York 4, N.Y., for Trans World Airlines, Inc.

Floyd M. Rett, 231 South LaSalle Street, Chicago 4, Ill., for United Air Lines, Inc.

C. Edward Leasure, 1701 K Street, N.W., Washington, D.C., for Northwest Airlines, Inc.

Dion R. Holm, 206 City Hall, San Francisco, California, for the City and County of San Francisco, California.

Francis A. Mulhern, 111-8th Avenue, New York 11, N.Y., for the Port of New York Authority.

Walter K. Bennett, Antitrust Division, Department of Justice, 235 U. S. Court House Building, Foley Square, New York 7, N.Y., Representing the Attorney General of the United States as Amicus Curiae.

Lyle Jones, Antitrust Division, Department of Justice, 870 Market Street, San Francisco, California, Representing the Attorney General of the United States as Amicus Curiae.

W. Archer Royall, Bureau of Enforcement, Civil Aeronautics Board, Washington 25, D.C., for the Bureau of Enforcement of the Civil Aeronautics Board.

This decision shall become final at the Civil Aeronautics Board 10 days after the date of service shown above and shall become effective upon the issuance of a Board order pursuant to Rule 28 of the Rules of Practice, unless within such 10-day period exceptions thereto are filed by one or more of the parties with the Docket Section, Civil Aeronautics Board, Washington, D.C., and served upon all other parties. If exceptions are filed within the period prescribed, briefs may be filed and served on all other parties within a further period of 20 days.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

REOPENED NEW YORK-SAN FRANCISCO NONSTOP
SERVICE CASE

DOCKET 9214 ET AL.

HEADNOTES TO INITIAL DECISION

I. It is found and concluded that no party to the original nonstop proceedings under Docket 9214 et al. before the Civil Aeronautics Board violated any of the provisions of Part 302 of the Board's Procedural Regulations, commonly known as the Board's Rules of Practice in Economic Proceedings;

II. It is found and concluded that the Port of New York Authority, the Port of Oakland and the Oakland Chamber of Commerce, and the San Francisco Chamber of Commerce did not at any time during the proceedings under Docket 9214 et al. violate Part 300 of the Board's Procedural Regulations, commonly known as the Principles of Practice of the Civil Aeronautics Board;

III. It is found and concluded that American Airlines, Inc., and the City and County of San Francisco, each individually and on its own, violated the Principles of Practice of the Civil Aeronautics Board, particularly Part 300.2 of the said Principles of Practice;

IV. It is found and concluded that the violations of American and the City and County of San Francisco of the Board's Principles of Practice did not prejudice Trans World Airlines, Inc., United Air Lines, Inc., or any other party to the nonstop proceedings under Docket 9214 et al.; that said violations of the Principles of Practice of the Civil Aeronautics Board on the part of American and the City and County of San Francisco did not deny a fair hearing to TWA, United or any other party to the proceedings under Docket 9214 et al.; and that the record in this reopened inquiry fails to provide sufficient reason or justification for voiding or rescinding or setting aside of the Order of Certification made to American by Order E-14412, dated September 2, 1959, which authorized American to provide a nonstop service between New York and San Francisco;

V. It is found and concluded that the Civil Aeronautics Board recommended to the United States Court of Appeals for the District of Columbia Circuit that violations of the Board's Principles of Practice on the part of American and

San Francisco did not vitiate the nonstop proceedings under Docket 9214 et al. and that said violations on the part of American are not sufficeintly grave to warrant disqualification of the carrier as the licensee for the third New York-San Francisco nonstop route;

VI. It is also found and concluded that the Board recommend to the Court that this reopened inquiry be terminated and the charges brought by TWA and United against American, San Francisco and other parties to the proceedings in Docket 9214 et al. be dismissed; and

VII. It is further found and concluded that the Civil Aeronautics Board should institute new rule-making proceedings to consider additional proposed amendments of a clarifying nature to both Part 302, the Board's Rules of Practice in Economic Proceedings, and Part 300, the Board's Principles of Practice.

Appearances:

Howard C. Westwood, Edwin H. Seeger, and A.V.J. Prather for American Airlines, Inc.

Henry P. Bevans and Edmund E. Harvey for Trans World Airlines, Inc.

Floyd M. Rett, John T. Lorch, H. T. Brown, Stuart Bernstein, and James Francis Reilly for United Air Lines, Inc.

C. Edward Leasure and Joseph F. Healy, Jr., for Northwest Airlines, Inc.

Dion R. Holm and Frank J. Needles for the City and County of San Francisco, California.

Francis A. Mulhern, Sidney Goldstein, and John G. Klos for the Port of New York Authority.

Walter K. Bennett and Lyle Jones for the Attorney General of the United States as Amicus Curiae.

W. Archer Royall and Jerome H. Huisentruit for the Bureau of Enforcement, Civil Aeronautics Board.

INITIAL DECISION OF EDWARD T. STODOLA, HEARING EXAMINER

Introduction

This reopened proceeding arises out of a recent review by the United States Court of Appeals for the District of Columbia Circuit of a decision of the Civil Aeronautics Board in the New York-San Francisco Nonstop Service Case, Docket 9214 et al., in which the Board amended the certificate of public convenience and necessity of American Airlines, Inc.[1] so as to authorize that carrier to operate nonstop airline service between New York/Newark and San Francisco/Oakland.

By Order E-14412, dated September 2, 1959, the Board certificated American to provide nonstop service between New York/Newark and San Francisco/Oakland. Thereafter, by Order E-14664, dated November 19, 1959, the Board denied without further evidentiary hearings certain petitions of Trans World Airlines, Inc. and United Air Lines, Inc. for reconsideration of aforesaid order alleging violations of the Board's Principles of Practice and its Rules of Practice in the prior proceedings before the Board.

On May 19, 1960, the United States Court of Appeals for the District of Columbia Circuit entered an opinion upholding the award to American against various challenges other than the ones relating to the alleged violations of the Board's rules. United Air Lines, Inc., et al. v. Civil Aeronautics Board, 281 F. 2d 53. The Court remanded the case to the Board for the purpose of holding a hearing to determine, with all convenient speed, the relevant facts on the basic issue of whether the Board's rules were so violated as to require the setting aside of the certification order on review. The order of remand is attached hereto as Appendix A.

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[1] After initial identification, the airlines and the other parties involved in this reopened proceeding will sometimes be referred to herein by their commonly used names.

History of the Proceeding

For the convenience and use of the Board and the Court in assessing and determining the meaning and significance of the basic relevant evidentiary facts hereinafter found with respect to the alleged violations of the Board's rules, and at the risk of some later repetition of the salient facts involved in this reopened inquiry, the procedural posture of this matter is presently outlined in chronological order.

January 12, 1953 - May 3, 1957. On January 12, 1953, American filed an application with the Board to amend its certificate for its transcontinental Route 4 by eliminating therefrom an existing restriction which permitted the carrier to serve San Francisco/Oakland only on flights which made stops at Tulsa, Dallas, or points west thereof. Among other things, this limitation of the carrier's certificate prevented nonstop service by American between New York and San Francisco. This application was assigned Docket 5903.

TWA and United have long held certificate authority for nonstop operations between San Francisco and New York. In the Denver Service Case, Docket 1841 et al., the Board consolidated another application of American which sought authority, among other things, to fly nonstop to San Francisco from Chicago and other points east of Chicago. Proposals of several other carriers were also included in this proceeding. The Denver case was decided on November 14, 1955.[2] American was authorized to fly nonstop between Chicago and San Francisco; but the Board denied American's application to the extent it requested the right to provide nonstop service to San Francisco from any point east of Chicago, including, among other points, New York/Newark. On December 30, 1955, American's petition for reconsideration of the Board's decision with respect to the carrier's application in the Denver case was likewise denied.[3/]

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[2] Denver Service Case, 22 C.A.B. 1178.

May 3, 1957 - January 13, 1958. On May 3, 1957 American filed with the Board a motion requesting that there be severed out of its 1953 application in Docket 5903 the issue of New York-San Francisco nonstop service and that an expedited hearing be held on this single broad issue. On May 13, 1957, the City and County of San Francisco, through its Public Utilities Commission, filed an answer supporting American's motion of May 3, 1957, for a severance and an expedited hearing on the carrier's application for nonstop service. On May 20, 1957, the Port of New York Authority likewise filed an answer in support of American's motion. Answers in opposition to American's motion were filed by United on May 27, 1957, and by TWA on May 28, 1957.

On June 26, 1957, the Board by Order E-11493 denied American's motion of May 3, 1957; but the Board directed its staff to "review the problems of the air service pattern between San Francisco and New York and report the results of that study to the Board on or about December 1, 1957."[4/] On December 2, 1957, representatives of the City and County of San Francisco met with the Board in

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[3/] Denver Service Case, 22 C.A.B. 1178, 1304.

[4/] The contents of this confidential report and the exact date of its filing in December 1957 are not disclosed by this record.

the Board's regular hearing room and urged a general need for more air service to San Francisco, including a third nonstop service to New York.

January 13, 1958 - July 30, 1958. On January 13, 1958, by Order E-12103, the Board, with two members dissenting, activated the New York-San Francisco nonstop proceeding by severing from American's application in Docket 5903 that portion relating to the New York-San Francisco nonstop issue and ordering an expedited hearing thereon. The severed proposal was assigned Docket 9214. TWA and United petitioned for reconsideration. On April 9, 1958, the Board by Order E-12337 denied the United and TWA requests for reconsideration of the order activating the nonstop proceeding with the same two members again dissenting.

The newly activated nonstop proceeding proceeded to prehearing conference held on April 29, 1958. On May 15, 1958, the Board by Order E-12511 consolidated into the proceeding a new application of Northwest Airlines, Inc. for New York-San Francisco nonstop authority. No applications other than those of American and Northwest were involved in the nonstop proceeding.

July 30, 1958 - March 9, 1959. Public hearings were conducted by Examiner Walter W. Bryan of the Board during July 30 - 31, 1958, in San Francisco and during September 9 - 18, 1958, in Washington, D.C. In addition to the two applicants, TWA, United, the City and County of San Francisco, the City of Oakland, the Oakland Chamber of Commerce, and the Port of New York Authority participated as formal parties to the proceeding. The Government was represented in the case through the Bureau of Air Operations of the Civil Aeronautics Board.

Briefs to Examiner Bryan were filed on November 10, 1958, by each of the foregoing formal parties except the City of Oakland. Oakland filed a brief statement in lieu of a brief. In addition, numerous statements were also filed with Examiner Bryan pursuant to Rule 14 of the Board's Rules of Practice in Economic Proceedings on or before the deadline set for the filing of briefs.

On March 9, 1959, Examiner Bryan rendered his Initial Decision which found that the public convenience and necessity required a third nonstop carrier between New York/Newark and San Francisco/Oakland; that American should be authorized to provide such nonstop service; and that the application of Northwest for authority to provide such service should be denied.

March 9, 1959 - September 2, 1959. Following the filing of exceptions to the Examiner's Initial Decision, and briefs to the Board in support thereof, the Board held oral argument on April 29, 1959.

On May 15, 1959, the Board issued a press release announcing that it had voted tentatively to grant American's application with two members dissenting. On September 2, 1959, the Board issued Order E-14412 granting American's application with the same two Board members dissenting.

September 2, 1959 - May 19, 1960. On September 22, 1959, petitions to reconsider and revise Order E-14412 were filed with the Board. Northwest filed a petition for reconsideration for Board Order E-14412; TWA filed a petition for rehearing and reconsideration of the order; and United filed a petition for rehearing, reargument and reconsideration in the same matter.

TWA's petition asked for a vacation of Order E-14412 and a termination of the proceedings or, in the alternative, a reopening with a preliminary hearing and stay of the order. United's petition for rehearing, reargument and reconsideration also asked for a stay of Order E-14412.

Answers to the three petitions for reconsideration were filed by American, the City and County of San Francisco, the San Francisco Chamber of Commerce, and the City of Oakland. TWA and United answered Northwest's petition. Among other counter pleadings filed were answers to United's petition for a stay by American, the City and County of San Francisco, and the San Francisco Chamber of Commerce. The Port of New York Authority filed a motion to strike portions of TWA's and United's petitions and answers thereto were filed by those two carriers.

In their petitions to the Board for reconsideration, TWA and United urged that Order E-14412 was legally defective by virtue of various substantive and procedural errors, included among others, a denial of a fair hearing by reason of ex parte communications made or inspired by American, San Francisco, and the Port of New York Authority and by other efforts of these parties to bring pressure or influence to bear upon the Board. These two petitioners claimed that the ex parte communications and alleged efforts to solicit and inspire pressure resulted in violations of Rule 2(a) and (c) of the Board's Principles of Practice and violation of Rules 18 and 24(j) of the Board's Rules of Practice in Economic Proceedings. Petitioners further claimed that these alleged violations necessitated a vacation of Order E-14412 and a hearing de novo, or in the alternative, a reopening of the proceeding with a preliminary hearing to determine the facts as to the alleged ex parte activities. If the latter course were chosen, the Board was requested to stay the effectiveness of Order E-14412. The petition for reconsideration filed by Northwest, the unsuccessful applicant, did not allege violations of the Board's rules.

Petitions for review and for a stay of Board Order E-14412 were filed with the United States Court of Appeals for the District of Columbia Circuit by United and TWA on October 22, 1959. On October 27, 1959, the Board issued Order E-14586 granting oral argument to determine whether and to what extent the allegations of violations of the Board's rules justified further action in the proceeding and, if so, what action should be taken. The order denied the petitions for reconsideration in all other respects.

On October 30, 1959, the Court of Appeals denied the petitioners' request for a stay of Board Orders E-14412 and E-14586. The Court retained jurisdiction over the petitions for review and authorized the Board to take further proceedings on the alleged violations of its rules pursuant to Order E-14586 and to report to the Court on such action within 20 days. In its order the Court specified that the petitioners could thereafter renew their request for a stay.

Oral argument on the alleged violation of the Board's rules was held by the Board on November 12, 1959. On November 19, 1959, the Board issued Order E-14664 denying and dismissing those portions of the petitions under reconsideration which had been the subject of November 12 oral argument. On the same day the Board reported its action to the Court.

As already noted, on May 19, 1960, the Court rendered an opinion upholding the nonstop route award to American against various attacks other than the ones relating to the violations of the Board's rules. The latter matters were remanded to the Board for further proceedings. On June 7, 1960, the Board issued Order E-15342 reopening the proceeding under Docket 9214 *et al.* in accordance with the order of remand attached hereto as Appendix A.

The Issues

It is arguable from the language of the opinion of the Court that the Court intended the Board only to ascertain the facts concerning alleged attempts by American to bring improper pressure to bear upon the Board and American's responsibility for the activity of other parties in the manner alleged by United and TWA, as opposed to a broader determination which would involve the nature and scope of the activities of such other parties. However, the Court's order of remand attached hereto as Appendix A is not so limited.

Presumably, after carefully considering the Court's opinion and its order of remand, the Board ordered that the proceeding under Docket 9214 *et al.* be reopened for the limited purposes of ascertaining the relevant facts and determining (a) whether any party to the Board's proceeding violated the Board's principles of Practice, and if so, (b) whether the Board's Rules were so violated as to require a setting aside of the order of certification authorizing nonstop air service between New York and San Francisco by American.5/

5/ Ordering paragraph No. 1 of Order E-15342.

The precise scope of this reopened proceeding was the subject of some controversy when the hearings began. The Board's use of the phrase "any party to the Board's proceeding" as shown in the preceding paragraph would, if literally interpreted, encompass the investigation of each of the formal parties to the original proceeding. But the Court's opinion and its order of remand is plainly not that broad. Moreover, the paragraph above reciting the Board's order limits this reopened inquiry to possible violations of the Board's Principles of Practice. In the light of the history of the original proceeding before review by the Court, it is further clear that in speaking of the "Board's Rules" in its order of remand, the Court had in mind possible violations of both the Board's Principles of Practice and its Rules of Practice in Economic Proceedings.

In the initial session of the evidentiary hearings, the Examiner ruled that this reopened proceeding encompasses the limited purpose of determining whether American or other parties to the original proceeding which supported American's application for the New York-San Francisco nonstop service violated the Board's Rules, including its Principles of Practice, and, if so, whether the Board's Rules were so violated as to require them setting aside the order of certification in Docket 9214 et al. The Department of Justice had no basic disagreement with this ruling on the scope of the proceeding; but it took the technically more narrow position that this reopened inquiry should concern itself with questions as to whether or not American Airlines had been a party to any violations of the Board's rules, either directly or through the City and County of San Francisco and other persons in the San Francisco area.[6]

Attached hereto as Appendix B are the Principles of Practice of the Board and certain provisions of the Rules of Practice in Economic Proceedings relevant to this reopened inquiry. In essence, the pertinent provisions of the Principles of Practice preclude "private" communications on the "merits" in cases "to be determined after notice and hearings" and further declare it to be improper for any person to attempt to bring pressure or influence on the Board in such cases. The Board's Rules of Practice govern the procedural conduct of economic proceedings before the Board whether instituted by order of the Board or by the filing with the Board of an application, complaint, or petition.

The June 7, 1960, order of the Board reopening the nonstop proceeding provided for (a) public hearings before an Examiner of the Board; (b) the filing by the parties of proposed findings and conclusions to the Board on all issues;

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[6] In other words, the Department of Justice would have limited this reopened proceeding to the questions of possible violations of the Board's rules by American, either directly or through persons "in privity" with the carrier. Under the Department's view, violations by a civic party to the original case which had no connection with American and as to which American had no knowledge would be irrelevant to the issues of this reopened proceeding. The Examiner's ruling goes a little farther in that it holds accountable to this inquiry the alleged improper activities of any civic party which supported American's application irrespective of its relationship to American during the course of the proceedings before the Board.

(c) findings of fact by the Examiner; and (d) certification of the entire record to the Board for tentative decision. On September 30, 1960, after the hearings in this reopened matter were completed, TWA filed a motion requesting the Board to direct the Examiner to issue an Initial Decision embodying findings of fact and conclusions on the issues in the reopened proceeding. No party opposed TWA's motion.

By Order E-16013, dated November 10, 1960, the Board granted TWA's motion and modified the original order reopening the proceeding under Docket 9214 *et al.* by providing for the issuance of an Initial Decision by the Examiner. Among other things, Order E-16013 provides that the proposed findings and conclusions due to be filed on November 21, 1960, would be treated as briefs to the Examiner. After the issuance of the Examiner's Initial Decision containing his findings and conclusions on all matters at issue in the reopened proceeding, the further procedural steps will be governed by the Board's Rules of Practice in Economic Proceedings. In other words, instead of limiting the Examiner's function in this matter to making findings of basic facts, Order E-16013 provides for the normal procedure in economic proceedings of an Examiner's Initial Decision containing findings of basic facts, findings of ultimate facts and conclusions. The Court has retained jurisdiction in this matter and the Board's final decision in this reopened proceeding is subject to review by the Court.

Findings of Basic Facts

Prior to the Board's decision in the *Denver* proceeding, *supra*, American's service to San Francisco/Oakland was limited to flights which made stops at

Tulsa, Dallas or points west thereof. Among other things, this prevented nonstop service between New York and San Francisco and imposed a considerable circuity on American's one-stop operations.

Although the Board made substantial changes in American's transcontinental route arrangements in the *Denver* case in the year 1955, including, among others, a new nonstop service for American between San Francisco/Oakland and Chicago and new one-stop service via Chicago between the Bay area in California and numerous points on American's system east of Chicago,[7] American, as well as San Francisco and Oakland, unsuccessfully sought reconsideration of the Board's decision in that proceeding which denied the carrier nonstop authority between the New York area and the Bay area in California.[8] Recognizing that a greater part of the Bay area New York traffic would very likely move on nonstop flights in the future, American had made vigorous arguments for the nonstop authority.

In its own petition for reconsideration in the *Denver* proceeding, the carrier also joined San Francisco and Oakland in the contention that the Board's *Denver* decision discriminated against the two cities in that the Bay area would continue to receive unrestricted transcontinental service to New York from only two carriers, TWA and United, whereas their neighbor city, Los Angeles, enjoyed such service from three carriers. TWA, United, and American. This contention was urged upon the Board in spite of the fact that the

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[7] 22 C.A.B. 1178, 1186-1200.

[8] 22 C.A.B. 1178, 1304-1311.

Los Angeles area was then generating substantially more New York traffic than the Bay area. Implicit in the arguments presented on reconsideration was the further contention that the Bay area's economic strength and strategic location would increase its traffic-generating ability if nonstop service by a third carrier were provided.[9] Moreover, as hereinafter found in more detail, San Francisco became alarmed during the processing of the nonstop proceeding under Docket 9214[10] over its alleged inferior status to Los Angeles with respect to transcontinental service to New York because it was given to understand in various ways that its lack of a third nonstop service might result in the inauguration of service by jet type aircraft out of Los Angeles before such service would begin out of San Francisco. Indeed, the probability of substantially earlier jet service for Los Angeles -- an alleged discrimination against San Francisco which eventually proved to be unfounded -- was very effectively used by American in the early stages of the nonstop proceeding to stir up interest in the Bay area in the carrier's proposal for a third nonstop route to New York.[11]

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[9] It is not uncommon for a city to claim discrimination vis-a-vis a neighboring point in either the volume or pattern of service available in Board route proceedings. The right of a city to litigate its relative service or route pattern status is well established. Fort Worth Investigation, Order E-12996, September 23, 1958; Washington-Baltimore Adequacy of Service Investigation, Order E-15162, April 29, 1960; and Southern Transcontinental Service Case, Order E-1286 August 5, 1958. Cf. Greensboro-High Point Air v. Civil Aeronautics Board, 231 F. 2d 517 (D.C. Cir. 1956).

[10] For the sake of brevity, the original proceedings under Docket 9214 will be referred to herein as the "nonstop proceeding."

[11] During the early phases of the nonstop proceeding American was expected to be flying jet aircraft nonstop in transcontinental service before TWA or United would get such equipment into service between the West Coast and New York.

Not long after the Board denied its petition to reconsider the *Denver* decision on December 30, 1955,[12] American began discussions within the company regarding a possible further proceeding for the removal of the certificate restriction on its transcontinental route which would give it nonstop authority between San Francisco and New York and other cities in the East. The City and County of San Francisco were first contacted by American regarding the problem of a new proceeding on the nonstop matter during the early months of 1956.

The first important post-*Denver* case meeting of American personnel regarding the nonstop issue took place at the St. Francis Hotel in San Francisco during August 1956. Several of the officers of the airline were in San Francisco during that month in 1956 to help with the company's business in connection with the national political convention held in that city during that month. No persons other than the carrier's personnel were present at this meeting.

Among the carrier's officials present at the San Francisco meeting in August 1956 were Walter H. Johnson, Vice President of Sales, who is no longer with the airline; Charles L. Strickler, an Assistant to the Vice President, based in the Washington Affairs office which was then headed by Morris Shipley, an Assistant Vice President of the carrier; Alfred R. Bone, Jr., Regional Vice President of the airline, based in Los Angeles; Charles H. Startup, who was then District Sales Manager of the carrier in San Francisco; and Thomas W. Barbour, who was then a Public Relations Representative of the carrier in the Bay area.[13] The St. Francis Hotel discussion, in the words of Mr. Barbour centered generally on what the carrier was "going to do next about removing the restriction." Numerous opinions were expressed at the meeting but no firm plan of action was reached.

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[12] 22 C.A.B. 1178, 1304.

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[13] During August 1956, and from that period through June 1958, Strickler reported to Shipley in the carrier's Washington Affairs office. Strickler's duties during the entire period relevant to this inquiry have been liaison work between the carrier and the Civil Aeronautics Board as well as community affairs activities in all cities served by American. In mid-1958 Shipley was transferred to New York and has been serving the carrier there since that time as an Assistant Vice President in charge of State and community affairs. Shipley's successor as head of the Washington Affairs office was Dwight D. Taylor, who still held the same position at the time of these reopened hearings. Since mid-1958, Strickler had been reporting to Taylor. Taylor assumed the responsibilities of the Washington Affairs office as an Assistant Vice President but became a Vice President of the company in late 1959. Prior to mid-1958, Taylor's principal responsibilities were liaison work with Members of Congress and occasional work with various departments of the Federal Government. After the latter date Taylor's responsibilities broadened and included, among other things, duties with respect to the carrier's regulatory problems in general. The Washington Affairs office reports directly to the carrier's headquarters in New York.

Bone served as Regional Vice President of American in Los Angeles during the years 1956 through 1959 and up to February 1, 1960. His territory then included the Bay area. During the foregoing period Bone reported directly to the carrier's headquarters in New York. Startup served as Regional Sales Manager of the carrier in San Francisco during the year 1956 and up to November 1957. Since the latter date Startup has been an Assistant Vice President of Sales in New York. During his term of service in San Francisco, Startup reported to Bone. Barbour has been in public relations work for American in San Francisco since 1954 and he had been the carrier's Manager of Public Relations in that city during the entire period here under investigation. Barbour reported variously to Bone, the Washington Affairs office and the carrier's headquarters in New York.

On November 2, 1956, Barbour sent a memorandum to Startup which read as follows:

> "The following summary of the new CAA statistics is in startling and incontrovertible support of the contention that San Francisco and Oakland are suffering from discrimination in the denial of additional airline services.
>
> "Maybe we should send it to newspaper editors, editorial writers, local congressmen, public utilities officials, business firms, civic leaders, and any others whose support we may desire.
>
> "Although our program toward elimination of the restriction doesn't start right away, the subject matter is news at the moment, and should be brought to the attention of newsmen before it is too old (probably right after the election). Other efforts, of course, can wait until Spring."

As of the date of the above memorandum, Barbour had no specific plan for implementing his suggestions to Startup. The memorandum was written on the assumption that either San Francisco or the carrier would soon do something about asking for a new proceeding on the nonstop issue. Barbour made this assumption because of the considerable dissatisfaction which then prevailed in the Bay area over the Board's decision in the Denver proceeding. There is nothing in the record to demonstrate that in using the clause "whose support we may desire" in the third paragraph of the above memorandum, Barbour intended in late 1956 any more than "support" for a request to the Board for a new nonstop proceeding.[14]

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[14] Shipley also called attention to the CAA publication showing some decline in commercial aircraft operations at San Francisco in a memorandum to Startup dated November 9, 1956. However, Shipley, who was closer to company policy on such matters than Barbour, was frank in stating the carrier's desire to have San Francisco's support on the merits of its application for a third nonstop. Among other things, Shipley's memorandum to Startup states as follows: "Our basic objective at this time, as you know, is to convince the people that there is good basis on the merits for supporting American specifically rather than just a plea for additional service."

The next meeting of American personnel regarding the nonstop problem took place in Los Angeles on February 4, 1957. The occasion on that date was the dedication of a new American maintenance facility for jet equipment at the Los Angeles International Airport. This second meeting was attended by C.W. Jacob, who for the past eight years has occupied the position of Senior Vice President and Secretary of American; Howard C. Westwood, Counsel for the carrier; Rex Smith, then former Vice President of Public Relations for American; and Messrs. Shipley, Strickler, Bone and Startup. Jacob had been receiving reports in his office throughout the year 1956 that San Francisco was very anxious to move ahead with a proceeding to obtain a third nonstop service to New York.[15]

A firm decision was made by American at the Los Angeles meeting of February 4, 1957, on taking some action to seek relief from the restriction which limited the carrier's flights between San Francisco and New York to a one-stop service. Jacob directed Shipley and Strickler to go to San Francisco at an early date to talk this matter over with the officials of the city and possibly its Chamber of Commerce and other agencies. Beyond asking Shipley and Strickler to find out if San Francisco would initiate action on its own to activate a new nonstop proceeding, Shipley and Strickler received no specific instructions as to whom they were to have discussions with in the Bay area. However, Jacob did authorize Shipley and Strickler to inform San Francisco that American would initiate appropriate action to activate the nonstop proceeding if the City would not. Moreover, Strickler was authorized to offer the officials of San Francisco any available economic data that might help the City in moving ahead on the nonstop issue. Finally, Strickler was authorized by Jacob to do what he could in publicizing the carrier and promoting its interest in the Bay area.

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[15] Jacob at all times relevant herein had supervisory and executive jurisdiction over the Washington Affairs office and its personnel.

Jacob met with the personnel of the carrier's Washington Affairs office, particularly Messrs. Shipley, Taylor, and Strickler, on many other occasions during the years 1957 through 1959. At times, the carrier's lawyers were present at such meetings. For the most part, these meetings took place either in Washington or in the carrier's headquarters in New York. In addition to other regulatory matters involving government agencies, the New York-San Francisco nonstop issue was discussed from time to time.

No specific instructions were given to Shipley, Taylor or Strickler by Jacob with regard to the observance of the Board's Rules prior to the time the nonstop issue was set for formal hearing. After the matter was set for hearing, Jacob felt the nonstop case acquired a "new posture". About that time Jacob cautioned his subordinates in the Washington Affairs office about making sure the Board's Rules were observed. However, Jacob was of the mind that even the latter instructions were not really necessary because the Washington Affairs personnel were experienced and had as much awareness of the Board's Rules as he did. Except for certain minor details, Jacob wholeheartedly approved of the activities engaged in by Messrs. Shipley, Taylor and Strickler during the entire course of the nonstop proceeding.

Jacob received status reports on the progress of the nonstop proceeding from time to time from Shipley, Taylor and Strickler. In the majority of the cases these reports were verbal rather than written.

Pursuant to the instructions from Jacob, both Shipley and Strickler went to San Francisco during the latter part of February 1957. During this visit or soon thereafter these two representatives of the carrier called on George Christopher, the Mayor of the City and County of San Francisco; Joseph W. Martin, Jr., then Chairman of the Public Utilities Commission of the City and County of San Francisco;[16] Dion R. Holm, City Attorney of the City and County of San Francisco; and Frank J. Needles, Deputy City Attorney of the City and County of San Francisco. Needles has long served as Counsel for the City and County in aviation matters.

Following his initial visit in 1957, Shipley made three other trips to San Francisco during that year from his Washington office and three such trips during the year 1958. Shipley made no trips to San Francisco during the year 1959. Inclusive of his February 1957 trip to San Francisco, Strickler made over 30 round trips to that City from his Washington office during the years 1957, 1958 and 1959. Eleven of Mr. Strickler's trips to San Francisco were made in the year 1957; twelve were made during the year 1958; and eight trips were made during the year 1959. Although Shipley and Strickler transacted other company business during their visits to San Francisco, a substantial part of their activities in San Francisco during the years just noted related to publicizing the carrier in that area in general and the pursuit of the carrier's interest in the nonstop proceeding in particular. Taylor made only one trip to San Francisco during the period involved in this inquiry but this journey of Taylor's was concerned with company business other than the nonstop problem.

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[16] The Public Utilities Commission of the City and County of San Francisco hereinafter will be referred to as the "PUC."

The PUC is an official agency of the City and County of San Francisco through which the City and County operates its airport and participates in proceedings before the Civil Aeronautics Board and other regulatory tribunals. The City and County make no important decisions regarding aviation matters except after approval of the PUC. During the February 1957 visit to San Francisco, Shipley and Strickler requested that the City and County of San Francisco file a motion with the Civil Aeronautics Board asking the Board to sever and set down for immediate hearing the San Francisco-New York portion of American's application in Docket 5903. The City and County were also requested at the same time to indicate their preference for American as the third nonstop carrier. The City and County, through Joseph W. Martin, Jr., Chairman of the PUC, rejected both of American's requests. San Francisco was interested in having such a motion filed but it wanted the carrier to file it. As of February, 1957, the City and County were more interested in getting a hearing on the nonstop issue than in the choice of the carrier if a third nonstop route were to be authorized.

Following the rejection by San Francisco of American's request that the City and County file the motion for severance and an expedited hearing, Shipley and Strickler told PUC that the carrier would file such a motion and urged the PUC to support the motion by appropriate answer. In approaching the officials of San Francisco with regard to the motion on their part for the activation of such a proceeding and in supporting American as the preferred carrier for the third nonstop service, Shipley and Strickler were armed with various statistical analyses which, among other things, outlined San Francisco's existing transcontinental services, a comparison of the services of Los Angeles to and from the New York area with similar services provided for the Bay area, the advantages of Los Angeles over San Francisco in the number of schedules to and from the New York area, and the alleged inevitability of the eventual choice of American as the logical third nonstop carrier between the Bay area and the New York area. Moreover, after informing the officials of San Francisco that the carrier would file the motion for severance and an expedited hearing, Shipley and Strickler offered to help San Francisco with the preparation of their answer supporting American's request.[17]

Upon being informed that American would file the motion for severance and an expedited hearing, San Francisco readily agreed to support such a motion. In these circumstances, the carrier on May 3, 1957, filed with the Board a motion requesting that there be severed out of its old 1953 application in

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[17] In addition to Shipley and Strickler, the initial meetings of the carrier with the PUC were attended by Bone of American and General F. B. Butler, Manager of the San Francisco International Airport at that time.

Docket 5903 the issue of New York-San Francisco nonstop service and that an expedited hearing be held on this single issue. At that time American was the only carrier having an application for such service.

Shortly after the filing of American's motion of May 3, 1957, the PUC of the City and County of San Francisco met in formal meeting on May 7, 1957, and voted unanimously by resolution to support American's motion for severance and an expedited hearing. Prior to taking the vote on the matter, the PUC in an open meeting heard representatives of American, TWA and United argue for or against the proposed resolution of PUC which would authorize the City and County of San Francisco to file an answer and motion with the Civil Aeronautics Board in support of American's motion for an immediate hearing on the nonstop portion of American's application in Docket 5903. The same resolution also requested that the Board of Supervisors of the City and County of San Francisco adopt a resolution urging the Board to activate a new proceeding on the nonstop issue. The resolution adopted by the PUC further stated that copies of its resolution be furnished to the Mayor of the City and County of San Francisco, the United States Senators from California, Congressmen from the San Francisco metropolitan area, and all other interested parties, and that they be requested to support San Francisco in urging the Board to set down for immediate hearing that portion of Docket 5903 proposing San Francisco-New York nonstop service.[18]

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[18] The PUC adopted a second resolution on or about May 7, 1957, which requested the San Francisco Chamber of Commerce to endorse the action of the PUC with respect to American's motion and to urge all other Chambers of Commerce in Central and Northern California to participate in San Francisco's efforts to obtain an early hearing on American's nonstop proposal.

Having participated in hearings on the proposed resolution of the PUC supporting American's motion, TWA and United thus acquired knowledge of San Francisco's plan to solicit support for an expedited hearing on the nonstop issue. Moreover, American's proposal for an expedited hearing on the nonstop issue was informally discussed with representatives of TWA and United as well as American by Mayor Christopher of San Francisco and by Chairman Martin of the PUC of the City and County of San Francisco prior to the filing of American's motion on May 3, 1957.

On May 7, 1957, San Francisco, through its PUC, adopted an answer in support of the motion of American.[19] On May 20, 1957, the Port of New York Authority and the Port of Oakland filed an answer in support of the carrier's motion to sever and expedite. Answers of United and TWA in opposition to the motion of American were filed with the Board on May 27 and 28, 1957, respectively.

The filing of American's motion for severance and expedition on May 3, 1957, and the answers thereto, were followed by a groundswell of activity in behalf of the carrier in Northern California. In addition to numerous persons prominent in either private and public affairs in the Bay area, various civic organizations joined in the demand for an immediate hearing on the nonstop issue. The clamor for such a hearing was fanned by news stories and editorials which began to appear in the press of the Bay area soon after the filing of American's motion.

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[19] The answer of San Francisco was filed with the Board on May 13, 1957.

On May 1, 1957, Strickler sent a memorandum to both Startup and Barbour which read in major part as follows:

> "You probably have already done so but if not may we suggest that, in connection with the press, civic and public relations program we discussed last week, thought be given to the preparation of a complete list of associations, groups, chambers of commerce, newspapers and other publications in San Francisco/Oakland and the surrounding cities and counties that we should call on.
>
> "It would also save time if we knew in advance the person or persons to see in the places of contact. If this can be done we should be in a better position when we sit down next Wednesday to block out our program and make specific assignments to the members of our group."

Copies of the above memorandum were sent to Shipley, Bone and Burck H. Smith. On May 8, 1957, Strickler met with Barbour, Startup and Burck H. Smith in San Francisco to make the contemplated assignments of personal activities of each man in the group.

Strickler assumed the overall charge of the carrier's activities with regard to the nonstop proceeding in the Bay area; Barbour was to continue with his responsibility of getting favorable publicity for the carrier on the nonstop problem; Bone was to contact various business groups in San Francisco on the same question; Startup was requested to contact the chambers or associations of commerce in the outlying cities in the Bay area; and Burck Smith, who was then a Regional Director of State and Community Affairs stationed at Los Angeles, was given a briefing on the carrier's plans with respect to enlisting support for its request for an expedited hearing on the nonstop issue but was not given any specific assignment at that time.[20] A comprehensive file on the important citizens of San Francisco, both in public and private life, was compiled by the carrier's San Francisco office sometime during the first part of May 1957. This list of persons was discussed at the meeting Strickler had with his associates on May 8, 1957. The carrier's San Francisco office also carefully compiled a so-called "clip book," showing the progress of the nonstop proceeding, including, among other things, a record of pertinent news stories and newspaper editorials, the various persons contacted, and the nature of the reaction to American's request for an early hearing on the nonstop issue.

Meanwhile, after the filing of American's motion, Taylor, who was then the carrier's liaison man with the Congress in Washington, visited various offices of Members of Congress from both the California and New York areas to inform them of the carrier's filing. It has long been the carrier's policy to inform Members of Congress of any important new route applications which might affect the constituents of those Members. At this stage of the proceeding, Taylor was of the mind that the filing of the carrier's motion was purely a procedural matter and that it was wholly appropriate for him to advise Members of Congress from the California and New York areas of American's request to the Board for an expedited hearing in the nonstop matter. In several instances Taylor was requested by a Member of Congress to supply a copy of American's motion and answers thereto. Taylor complied with such requests. In the event a Congressman asked Taylor what the Congressman could do to help, Taylor would tell the Congressman to take such steps as the Congressman thought appropriate. Taylor did not think that a letter by the Congressman to the Board at this point in the proceeding would be inappropriate. In almost every instance, the Members of Congress contacted by Taylor after the filing of American's motion wrote letters to the Board during June 1957 in support of the carrier's motion for an expedited hearing. Copies of such letters were not served upon TWA or United.

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[20] A short time after May 8, 1957, meeting Smith contacted the Chamber of Commerce at Sacramento in the interest of American's motion at the suggestion of Strickler. Smith made frequent trips to Sacramento in the course of his regular duties with the airline.

Congressional contacts of the kind just described were then not peculiar to American Airlines. Other air carriers have engaged in similar activities in Congressional offices in the past.

Several of the activities of American and of San Francisco regarding the nonstop problem which followed the filing of American's motion on May 3, 1957, were already in the advanced planning stage at the time the motion was filed. Thus, the prospective action of the PUC on a resolution adopted on May 7, 1957, approving the filing of the answer of San Francisco in support of American's motion, was known to Startup on or before May 6, 1957.[21] Similarly, sometime prior to the filing of American's motion and the adoption of the aforesaid position by the PUC, Needles, Deputy City Attorney of San Francisco, prepared a draft form of a proposed resolution concurring in the action of the PUC for use by the Boards of Supervisors of 13 counties in Northern California, plus the draft of a letter of transmittal in behalf of George Christopher, Mayor of the City and County of San Francisco. The Mayor's letter and the draft of the proposed resolution, both of which were prepared on or about May 2, 1957, were sent by the Mayor to various Boards of Supervisors of the counties in and around the Bay area. As proposed by Mayor Christopher, a number of the counties adopte resolutions through their Boards of Supervisors patterned after the proposed draft which was sent to them by the Mayor of San Francisco and such resolutions were filed with the Civil Aeronautics Board during the months of May and June 1957, either through Mayor Christopher's office or directly to the Board. Mayor Christopher also contacted various Members of Congress from the State of California seeking their cooperation and support for an expedited hearing on the nonstop issue.

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[21] In a memorandum to Jacob dated May 6, 1957, copies of which were sent to Shipley and Bone, Startup called Jacob's attention to an editorial appearing in the San Francisco Chronicle and to another appearing in the San Francisco Call-Bulletin on the same day, both in support of American's motion, and then advised Jacob as follows:

> "Tomorrow (Tuesday, May 7th), the Public Utilities Commission will act on a resolution 'Directing the filing of an answer and motion with the Civil Aeronautics Board supporting the motion of American Airlines to sever and set down for immediate hearing the San Francisco-New York nonstop portion of the application under Docket 5903, the Commission believing that San Francisco is entitled to a third nonstop air service between San Francisco and New York; requesting the Board of Supervisors to adopt a resolution in furtherance of the motion; copies of Commission's resolution to be furnished Honorable Mayor George Christopher, state senators, congressmen from the Bay Area and other interested parties.' "

On May 14, 1957, the Transportation Committee of the San Francisco Chamber of Commerce held a meeting at the invitation of Charles C. Miller, Manager of the Transportation Department of that Chamber, in order to help the Chamber decide whether or not it should support the City and County of San Francisco in accordance with the resolution of its PUC which endorsed the motion of American The aforesaid Transportation Committee consists of 43 members representing each of the various transport industries in the Bay area, including, among others, the airlines engaged in air service to and from that area. As in the case of civic organizations in other cities in other route proceedings before the Civil Aeronautics Board, the May 14 meeting was sort of a preliminary hearing to aid the Chamber of Commerce in deciding on the course to follow regarding the proposed new nonstop proceeding. Representatives of American, TWA, United and of other carriers were present at the meeting. After presentations by several air carriers both for and against an expedited hearing on the nonstop issue, the Transportation Committee of the San Francisco Chamber of Commerce agreed to support the motion of American and the resolution of the San Francisco PUC for an expedited hearing. The Board of Directors of the San Francisco Chamber of Commerce approved the Committee's recommendation. By a letter dated May 24, 1957, and addressed to the Chairman of the Civil Aeronautics Board, the San Francisco Chamber of Commerce, through the foregoing action of its Board of Directors, expressed support of the efforts of the PUC to obtain an expedited hearing on the nonstop question.[22]

The Chamber of Commerce of San Francisco generally works very closely with City Hall in that City regarding applications for new or additional air service,

and copies of the City's communications to the Civil Aeronautics Board regarding the nonstop proceeding during the May 1957 period were in each case forwarded to Charles C. Miller, Manager of the Transportation Department of the San Francisco Chamber of Commerce. And, following the standard procedure of the Chamber of Commerce in matters of this kind, the Chamber sent copies of its May 24 letter to the two United States Senators then representing the State of California and to certain members of the House of Representatives in Washington representing the Bay area. While copies of the May 24 letter were not served upon TWA or United, the two carriers were aware of the action of the San Francisco Chamber of Commerce endorsing the resolution of the PUC of that City which favored an expedited hearing.[23]

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[22] The above letter was signed by E. D. Maloney, President of the San Francisco Chamber of Commerce, and it was filed with the Civil Aeronautics Board on May 27, 1957. The San Francisco Chamber of Commerce then made clear that its action at that time was limited to the matter of an expedited hearing and was not to be construed as an expression of preference for any particular carrier. The Chamber did request, however, that its letter of May 24, 1957, be made part of the record in Docket 5903.

The San Francisco Chamber of Commerce did not solicit support for American's motion of May 3, 1957, from associations or chambers of commerce in the outlying communities of the Bay area. But, as hereinafter found, the San Francisco Chamber of Commerce did solicit statements supporting a third nonstop service from such organizations after the hearings in the case were completed. This latter activity of the San Francisco Chamber of Commerce was proper and lawful.

In a letter dated May 29, 1957, and filed with the Board on June 3, 1957, Mayor Christopher of San Francisco made extensive comments on the answers filed by TWA and United to American's motion of May 3, 1957. The Mayor then again requested an immediate hearing on American's proposal for nonstop service. The letter of May 29, 1957, of San Francisco was served on American, TWA, United and the Port of New York Authority. But the letter enclosed a long list of persons or organizations which had already written to the Board regarding the need for an early hearing. In his letter of May 29, 1957, the Mayor called attention to the earlier correspondence to the Board by California State officials, Members of Congress, municipalities and chambers of commerce in the Bay area, and the San Francisco Labor Council.

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[23] Immediately prior to the favorable action on American's motion taken by the San Francisco Chamber of Commerce, the Mayor of San Francisco sent the Board a letter dated May 21, 1957, with copies of resolutions of numerous municipalities and civic groups in the Bay area taking similar action. The latter letter and its enclosures were received by the Board on May 27, 1957.

On June 3, 1957, Congressman Shelley wrote a letter to Mayor Christopher in which he stated in part as follows:

> "In addition to these matters, I am continuing to work on the CAB to grant a hearing on the American Airlines nonstop San Francisco-New York application."

Copies of Congressman Shelley's letter of June 3, 1957 to the Mayor were sent to four prominent civic leaders in the Bay area.

In addition to contacting various civic leaders in the Bay area, Strickler and Bone decided to contact business groups and the chambers of commerce of the outlying communities in the Bay area. As already noted, responsibility for the latter contacts was placed largely upon Startup and his sales personnel in those communities. These contacts began about mid-May 1957. In accordance with instructions from Strickler and Bone, Startup asked his zone managers and his sales people to get in touch with the various chambers of commerce in the Bay area with the view of asking them to adopt resolutions in support of American's motion for severance and an expedited hearing. These instructions contemplated suggestions to those chambers as to the type of resolution to be proposed and the mailing of such resolution to the Civil Aeronautics Board and to interested Members of Congress from the State of California. Following this activity, there were filed with the Civil Aeronautics Board resolutions by the Chambers of Commerce of Alameda, Burlingame, Hayward, Mill Valley, Richmond and other outlying communities. These resolutions as filed with the Civil Aeronautics Board were in some cases almost identical in form and were either drafted by an employee of American or followed the pattern of a draft furnished the respective chambers of commerce by a representative of the carrier.[24]

Among the civic groups in the Bay area interested in the nonstop matter was the Downtown Association of San Francisco.[25] On May 8, 1957, the Downtown Association through its Board of Directors adopted a resolution urging the need of a third nonstop service to New York and transmitted that resolution to the Civil Aeronautics Board through Mayor Christopher.

24/ After the filing of the letter of May 24, 1957, of the San Francisco Chamber of Commerce with the Civil Aeronautics Board, the sales representatives of American in some cases used the letter-form of resolution filed by the San Francisco Chamber of Commerce in their approaches to the outlying area chambers of commerce.

25/ The Downtown Association of San Francisco is a nonprofit civic association devoted to the economic development of the City of San Francisco. Its membership encompasses substantially all of the significant business, commercial and financial interests of that City.

The correspondence of the Downtown Association after the adoption of its resolution of May 8, 1957, followed the usual pattern used by this civic organization during the course of many new route cases. Copies of its resolution were sent to Mayor Christopher, Bay area municipalities, Senators Knowland and Kuchel, Congressmen Mailliard and Shelley, as well as to other Congressmen from the State of California. The information available to the Downtown Association regarding the nonstop proceeding was contained in a "memorandum to editors" which had been prepared by Barbour for the daily press of the Bay area and which summarized in considerable detail the history of the nonstop issue, San Francisco's position with respect to another nonstop proceeding, the probability of jet service in the San Francisco-New York market, and the position of American in its struggle for a new nonstop proceeding.

Although he had been contacted by Shipley prior to May 3, 1957, the Manager of the Downtown Association, Thomas Gray, took further steps on his own in discussing the nonstop problem with a representative of American after he saw a story in the San Francisco press on the filing of American's motion of May 3, 1957. At about the same date Gray asked Barbour for information on the nonstop problem and Barbour responded by giving Gray the "memorandum to editors" noted above. It was dated April 30, 1957, and received by Gray on May 3, 1957.

The communications of the Downtown Association reviewed above were sent prior to the Board's order granting a hearing in the nonstop case. The Association's resolution of May 8, 1957, however, supported American's candidacy for the third nonstop route, since it urged "the Civil Aeronautics Board to consider and act promptly and favorably on the most recent application of American Airlines." As already stated, the resolution of the Downtown Association of May 8, 1957, was passed by its Board of Directors. Both Gray and President Albert E. Schlesinger of the Association were vague in their testimony as to whether or not there was an informal hearing at which American, TWA and United appeared before the Board of Directors prior to the adoption of the resolution. But the record is clear that some time prior to the adoption of the resolution representatives of American as well as of TWA and United had been in contact with either the officers or directors of the Downtown Association and argued for or against the adoption of the resolution. After the initial resolution supporting a hearing was adopted on May 8, 1957, the Downtown Association was confronted with opposition to the Association's continuing participation in the nonstop proceeding after the Board granted a hearing. Strong opposition to participation by the Association in the hearings on the nonstop issue was voiced to the Board of Directors of the Association by Warren Burke, a representative of United stationed in San Francisco. The very fact that the Association heard Burke on this question and debated the advisability of continuing participation in the nonstop case is evidence of United's power in the business community of the Bay area.

During the period between May 3, 1957, and June 26, 1957, the Board received communications from several travel agents urging an expedited hearing on American's nonstop proposal. In addition to contacting chambers of commerce and various large users of air traffic in the Bay area, American's sales representatives also contacted several ticket agents; but the record is somewhat confused as to whether the carrier asked its sales people to call on travel agents in the Bay area during the early phases of the nonstop matter.

Thus, in the early part of May, 1957, a sales representative of American discussed the proposed nonstop proceeding with one of the co-owners of Andrews Travel Agency in Berkley, California. As a result of this discussion Mr. Andrews of the Andrews Travel Agency wrote a letter dated May 24, 1957, with the heading or salutation "To Whom It May Concern," expressing the hope that favorable consideration would be given to the establishment of another nonstop service between San Francisco and New York. This letter was sent to the Civil Aeronautics Board and received by the Board on June 6, 1957. Copies of the same letter were also sent by Andrews to representatives in Congress from Andrews' district, as well as to the two United States Senators representing the State of California at that time. Another sales representative of American contacted the Contra Costa Travel Service at Concord, California, and after the discussion with that representative, Contra Costa sent a wire, under date of May 15, 1957, to a Member of Congress from Northern California advising the Congressman that the travel agency supported the motion of American Airlines for an early hearing on the nonstop issue, as well as advice to the further effect that the Bay area was entitled to a third nonstop service to New York. In a letter dated May 23, 1957, that Congressman wrote to the Civil Aeronautics Board in which he transmitted the wire of the Contra Costa Travel Service and inquired of the Board what steps could be taken to expedite the nonstop proposal of Docket 5903.

The Congressman's letter was received by the Board on May 24, 1957, and this letter, along with the attached wire of the Contra Costa Travel Service, was placed in the correspondence file of Docket 5903. At about the same time the Charles Travel Service of Stockton, California, was contacted by a sales representative of American on the matter of the proposed nonstop proceeding. As a result of this latter contact, John Charles, Jr., of the Charles Travel Service, wrote to the Chairman of the Civil Aeronautics Board by a letter dated May 21, 1957, urging the Board to grant American's motion of May 3, 1957. This letter was received by the Board on May 27, 1957, and it was also placed in the correspondence file of Docket 5903.[26] In urging the Board to grant American's motion, the letter of the Charles Travel Service stated that American would inaugurate transcontinental jet transport service before any of the two carriers that were then in the San Francisco-New York market would be able to begin such service. As a matter of fact, the sales representatives of American were using the argument that American would have at least six months' lead on TWA in inaugurating jet transport service to and from the West Coast in their various contacts for enlisting support of American's motion of May 3, 1957.[27]

In a letter dated May 22, 1957, and received by the Board on May 27, 1957, Merritt Greene of Travel Advisors of San Jose, California, urged the Board to give early consideration to American's application for the third nonstop service.

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[26] Sales representatives of American carried with them the names and addresse of each Member of the Civil Aeronautics Board in making their contacts in the Bay area.

[27] In point of fact, TWA actually inaugurated jet service out of San Francisco two days before American did.

The record is unclear as to whether or not a representative of American inspired or prompted the writing of Greene's letter.

Even if it assumed that American's management did not request its sales representatives to contact travel agents in the Bay area prior to the activation of the nonstop case, the activities of its sales people in California must be imputed to the carrier. It is a fair inference from the facts relating to the travel agents' communications to say that at least Startup was aware of what the carrier's sales people were doing with respect to travel agents in the Bay area. To the extent that Startup's testimony denies knowledge of contacts with travel agents in the Bay area by American's sales personnel during May, 1957, such testimony is not credited. It is here found as a fact that at least the Andrews' communication to the Board was the result of a direct result of solicitation on the part of American. Moreover, there is a strong probability that the Charles' communication of May 21, 1957, to the Board was also inspired by American.[23]

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[23] Charles Travel Service was contacted by Richard Dominiak, a sales representative of American, some time after May 3, 1957. Prior to seeing Charles, Dominiak visited Clarence M. Shy, Director of Aviation of San Joaquin County at Stockton, California, and asked for the support of San Joaquin County in the nonstop matter. A resolution of San Joaquin County dated May 27, 1957, in support of an immediate hearing on American's proposal was filed with the Board on June 6, 1957. Dominiak advised Charles of his visit to Shy and the Stockton Chamber of Commerce and the reasons for those visits. The technical information contained in the Charles' communication of May 21, 1957, to the Board was furnished to Charles by Dominiak. Charles also received the name of each Board member and the address of the Board from Dominiak. While Dominiak did not recall asking Charles to do anything, there are obvious inconsistencies in Dominiak's testimony regarding his efforts to obtain support for American's motion from travel agents and chambers of commerce in the Bay area. Dominiak's denial of his solicitation of support from Charles cannot in all respects be credited.

There is further evidence in the record that during the year 1957, prior to the activation of the nonstop proceeding, one of American's sales representatives in the New York area discussed American's nonstop proposal with four travel agents in that territory, three of whom were asked to write their Congressmen with regard to the matter. This American sales representative was not acting under specific instructions from his superiors. As hereinafter shown, however, this and other sales representatives of the carrier solicited certain travel agents in the New York area in the early part of the year 1959 to have those agents write Members of Congress requesting the latter to appear at oral argument. The solicitations made of travel agents in 1959 resulted from specific instructions from the carrier.

As in the case of TWA and United, American maintains a rather exclusive club arrangement whose membership is limited for the most part to large users of air transportation via American Airlines. The carrier calls its club the "Admirals Club."[29/] The major purpose of the club is to provide the large users of air transportation a little more comfortable facilities than the usual airport terminal waiting room while the passenger is awaiting the departure of a flight. The record, however, reveals that American has been using its club for purposes other than providing a more comfortable waiting room for prospective departees on the carrier's flights. It has in a number of cases commissioned "Admirals" in its "Flagship Fleet" on the basis of a person's relative importance in his home community.

29/ TWA and United call their clubs the "Ambassador Club" and the "100,000-Mile Club", respectively.

Recommendations for an "Admiral" appointment are generally made by the carrier's corporate officials, although other employees of the carrier also make such recommendations. These recommendations are usually approved by the District Sales Manager of the appointee's home town and by action of the "Admiralty Board" of the carrier. Illustrative of the lengths to which American has gone in commissioning "Admirals" of its "Flagship Fleet" and latching on to high-ranking civic, industrial and legislative leaders is the case of one Eveleth E. Hayden. Recommended for an "Admiral's" appointment in May, 1957, Hayden received his commission as an "Admiral" in the "Flagship Fleet" in August, 1957. Hayden had never traveled on American Airlines in his life. He was recommended for an "Admiral's" appointment by the sales representative of American in the City of Oakland on the following grounds:

> ". . . . because the nature of his work for the major firms in Alameda County, Mr. Hayden is well acquainted with both legislative and civic leaders. Mr. Hayden has been of considerable assistance with every docket before the CAB -- giving support for AAL. He has enlisted the aid of all manufacturing associations in Alameda and Contra Costa Counties for Docket No. 5903."

Of course, not all of the "Admiral" appointees of American fail to use the carrier's services. On the contrary, in the great majority of cases the "Admiral" appointees are frequent passengers on American's flights. And in the case of Hayden the stated grounds for his appointment as an "Admiral" were somewhat exaggerated. Hayden became acquainted with American's nonstop application in early May, 1957; he distributed a copy of a resolution adopted by Alameda County Industries[30] to other trade organizations in the Bay area; and he urged those trade organizations to consider taking similar action with respect to American's nonstop application. The Alameda resolution was in the language of a form resolution distributed by American. Resolutions almost identical to the Alameda resolution were also sent to the Board and various Members of Congress by the Berkeley Manufacturers Association, Berkeley, California; Washington Township Industries, Inc., Fredmond, California; and the San Leandro Chamber of Commerce, San Leandro, California.

At the time Shipley and Strickler made their joint visit to San Francisco in February 1957, to get the ball rolling on the carrier's campaign to interest both the private business and public office sectors of the Bay area community in support of an expeditious hearing on the nonstop issue, there already existed a general understanding as to what Barbour's role would be in this particular endeavor of the carrier. This role was quite accurately defined in Barbour's memorandum to Strickler of November 2, 1956, as hereinbefore set forth. Barbour function with respect to the proposed new nonstop proceeding was really a continuation of Barbour's activities in the San Francisco area in connection with American's application for various route extensions and adjustments, including the proposed nonstop authority between San Francisco/Oakland and New York/Newark as litigated in the Denver proceeding.

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[30] Hayden is secretary of Alameda County Industries, Inc., which is a trade association in the Oakland area. The Alameda resolution supporting a third nonstop service between San Francisco and New York was adopted on May 22, 1957 and filed with the Board shortly thereafter. Copies of the Alameda resolution were also furnished to certain Members of Congress from California.

Barbour had furnished each of the daily newspapers of San Francisco a condensed summary of American's exhibits on the merits of the issues in the Denver proceeding in the form of a "memorandum to editors."[31] Supplying newspapers with information either through memoranda, releases or other types of written handouts during the pendency of proceedings before the Civil Aeronautics Board is a common practice in the airline industry. It was done by other carriers in the nonstop proceeding under Docket 9214, which is the subject of this reopened inquiry. Providing the newspapers with news from internal sources or other information services in new route cases before the Board has been a particularly consistent practice of air carriers. Similarly, the practice of providing information to the daily press is common to litigants in pending proceedings of other administrative tribunals. Indeed, the various regulatory agencies as well as the executive departments of the United States Government have their own press relations or public information offices designed to keep the public informed of their respective activities through the media of the

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[31] In the jargon of newspaper journalism a "memorandum" is a special type of written handout which provides background information on a particular subject for whatever use a newspaper might wish to make of it. A "news release" given to the press is an item that can be printed by the newspaper verbatim if the newspaper considers it properly written, factual and of general news interest. Even "news releases" are sometimes rewritten by newspapers before publication. The word "handout" generally refers to any written material that a press relations man might give to the press without reference to what particular classification it would fall into. A "memorandum to editors" is a very common document in newspaper journalism and may cover a wide variety of information which comes to a newspaper's attention and upon which the newspaper can either base a story or be kept informed of current news developments on a particular matter.

Nation's press and communications industry, including among other services the daily newspapers, radio, television, weekly news magazines and trade journals.[32/]

32/ Illustrative of news or press releases by both private litigants and government agencies are the following matters of record in this case: an undated news release of Delta Air Lines regarding Delta's position at oral argument before the Board in the Southern Transcontinental Service Case, beginning on September 26, 1960; a news release of Continental Air Lines for the afternoon papers of May 9, 1960, commenting on Continental's brief to the Examiner in the Trans-Pacific Route Case; a press release of Eastern Air Lines of August 26, 1960, making extensive comments on Eastern's brief to the Board in support of exceptions to the Examiner's Initial Decision in the Southern Transcontinental Service case; a press release of Western Air Lines of September 8, 1960, making comments on the carrier's presentation before the Board on oral argument in the Trans-Pacific Route Case; a radio release for 6:00 o'clock p.m. September 22, 1954, and a press release for September 23, 1954, by Riss and Company, Inc., Kansas City, Mo., listing its Attorneys with their Washington addresses and announcing the filing of a suit in Federal District Court in Kansas City, Mo., under the Sherman and Clayton Acts, alleging damages of $30 million and seeking to recover triple that amount as provided by the Nation's antitrust laws; a press release of September 15, 1949, wherein the then incumbent Attorney General of the United States, J. Howard McGrath, announced the filing on that day of a civil antitrust suit against the Atlantic & Pacific food chain; a press release of the Department of Justice of the United States of October 25, 1957, wherein the then incumbent Attorney General, Herbert Brownell, Jr., announced that the United States was filing on that day in the United States District Court in Chicago -- in accord with that Court's prior instructions -- the Government's proposed final judgment in United States v. E. I. duPont de Nemours et al.; and a press release by American Airlines announcing that the carrier filed suit on August 3, 1958, in the United States District Court, Southern District of New York, against the Airline Pilots Association, charging breach of contract on the part of the Association, which allegedly resulted in a pilots' strike.

To make the findings made in the above footnote conform generally to the contents of the press releases noted, appropriate citations of the cases involved have been omitted.

Barbour had two major roles to perform in connection with the nonstop proceeding which is the subject of this inquiry. The first role -- the one that took up most of his time insofar as the nonstop issue was concerned during the years 1957, 1958 and 1959 -- was that of an "errand boy"for Strickler, who was then working out of his Washington office, as well as an "errand boy" for Needles, Deputy City Attorney of San Francisco, who was coordinating San Francisco's various efforts to obtain an expedited hearing on the nonstop question. In his first role, Barbour made contacts for Strickler which Strickler could not make himself and supplied information to Needles which in some cases was unavailable to the City. This information dealt largely with the economics of San Francisco's transcontinental air services. In his second role, Barbour was engaged in supplying information to the daily press of the Bay area, primarily in the way of memoranda to editors, and secondarily in the way of releases, handouts and personal contacts. This dual activity of Barbour accounted for only a fraction of the time he spent on his regular duties as American's press representative in the Bay area in the years 1957 through 1959.

Since the airline industry is one affected by the public interest and since the industry must account for itself to the Congress and to various government agencies such as the Civil Aeronautics Board and the Federal Aviation Agency, it is American's view that it as a carrier serving the public must also account for itself to the Nation's press. The carrier's Vice President of Public Relations, Willis Player, stated in substance the carrier's policy of keeping the press informed in the following words:

> "American Airlines historically has regarded the matter of keeping the public and the press informed an obligation rather than a voluntary activity to be conducted at whim and irregularly. As part of its program for keeping the press informed, the company has consistently provided the press with summaries -- or, in some instances, complete statements -- of the company's position in various regulatory and court proceedings. Naturally, questions of news judgment are given due weight in determining how extensive a summary should be. But these judgments are not too difficult to make, since the press is always willing to advise.
>
> "Although the company has regarded its program of press and public information as an obligation, it may be noted that the company in practice has very little alternative. Almost all of the proceedings in which the company engages are public in nature. The orders, official actions and proceedings of the federal regulatory body are a matter of public record and are frequently the subject of C.A.B. press releases and the object of factual press coverage and editorial comment. Submissions by the carriers are also public and are available upon request. And even if it were possible to withhold information in these matters, it would be untenable from a public relations viewpoint to attempt to do so -- and would be contrary to the whole goldfish-bowl posture of the industry."

Player's "goldfish-bowl" philosophy is an interesting one and it no doubt represents the view of much of the airline industry. But there is no evidence that Player is an authority on the appropriate relations between a carrier in an adjudicatory proceeding and the legitimate interest of the press in such a proceeding.

With the filing of American's motion on May 3, 1957, the carrier's request for a nonstop proceeding at an early date and the efforts of the City of San Francisco and other municipalities in the Bay area supporting that request became a news matter of major importance in the daily press of the Bay area.33/

33/ During the early months of 1957, Strickler was introduced by Barbour to certain of the publishers and a number of the editorial writers associated with the daily papers of San Francisco.

The daily newspapers of the Bay area gave wide publicity to American's motion of May 3, 1957, San Francisco's answer thereto, the resolutions of Boards of Supervisors and Chambers of Commerce, and the various individual efforts of civic and public officials in Northern California in appealing to the Civil Aeronautics Board for an early hearing. Each of the daily newspapers in San Francisco and certain of the daily newspapers in some of the outlying districts in the Bay area editorialized in support of such a hearing. The editorial opinion of the daily press in the Bay area was strongly concerned with the possibility that with the coming of the jet transports the Bay area would lag behind Los Angeles in adequate air service to and from the East Coast.

During all the times relevant to the nonstop proceeding under Dockets 5903 and 9214 the Civil Aeronautics Board maintained a commercial clipping or press intelligence service under which the editorials and news stories of general interest to the Board were furnished it by this service. The editorials and news stories sent by the service were circulated among Board Members immediately upon their receipt by the Board's Office of Information.[34]

In a letter dated May 23, 1957, George Christopher, the Mayor of the City and County of San Francisco, wrote James R. Durfee, then Chairman of the Board, as follows:

> "Your attention is directed to the enclosed newspaper editorials and articles supporting San Francisco in its endeavor to obtain additional nonstop air service to New York.
>
> "It is apparent that Northern California is aware of the present disparity of air service given to this portion of the state and the necessity of meeting the challenge of the jet age.

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[34] Since the close of the hearings in this reopened inquiry, the Board has discontinued its commercial clipping or press intelligence service.

"Your consideration of San Francisco's request for an immediate and expedited hearing in this matter will be greatly appreciated."

The above letter and its enclosures were received by the Board on May 28, 1957. As the letter states, the enclosures consisted of newspaper editorials and articles supporting San Francisco in its endeavor to obtain additional nonstop service to New York. The editorials enclosed by the Mayor were frank in their endorsement of American as the third nonstop carrier between San Francisco and New York. Neither the Mayor's letter of May 25, nor any of the enclosures were formally served upon TWA, United or American. In a letter dated May 29, 1957, Mayor Christopher, as already noted, again wrote to the Board regarding the nonstop proceeding and on that date the Mayor enclosed a long list of persons and organizations that had already filed communications with the Board endorsing an early hearing on American's application. This May 29th letter was received by the Board on June 3, 1957. While the Mayor's foregoing letter of May 29, 1957, was served on TWA, United, and American and the Port of New York Authority, the communications referred to therein were not served on TWA or United, save for the letters of the Port of New York Authority, the Port Authority of Oakland and th Board of Supervisors of Alameda County.

Mayor Christopher sent another letter to Durfee dated May 29, 1957. This latter letter was received by the Board on June 4, 1957. The Mayor's second letter on May 29, 1957 transmitted further editorials and news articles, along with resolutions of several neighboring municipalities in the Bay area, as alleged "evidence" or Northern California's interest in the matter of additional nonstop service between San Francisco and New York.

Mayor Christopher would normally personally prepare letters of a routine nature such as the second May 29 communication filed with the Board on June 4,

1957. On matters pertaining to specialized data with which he was not familiar, such as the May 29 letter received by the Board on June 3, 1957, and similar communications of the Mayor which dealt with detailed and technical matters, the Mayor would consult with members of the PUC, particularly Chairman Martin, and with Deputy City Attorney Needles. The Mayor would not have sent the various newspaper clippings to the Board which accompanied his letters in May, 1957, without first consulting either a member of the City Attorney's staff or a member of the PUC.

Although the precise extent to which American had direct and contemporaneous knowledge of the fact that the Mayor made the foregoing transmittals by his communications of May 23 and 29, 1957, is not disclosed by the record, the carrier's personnel in San Francisco were aware of the Mayor's great interest in the nonstop matter, they were aware of the Mayor's request that copies of resolutions adopted by neighboring counties and chambers of commerce be sent to him, and they were further aware of the fact that the Mayor was sending materials to the Board. Moreover, San Francisco, through Martin, then Chairman of the PUC, and Needles, the Deputy City Attorney, had kept American generally informed of the various actions taken by San Francisco during this period.

The Bay area personnel of each of the three carriers -- American, TWA and United -- were aware of the news articles and editorials appearing in the Bay area press regarding the proposed nonstop proceeding. However, there is no evidence to show that TWA or United were aware of the fact that Mayor Christopher had caused the transmittal on an ex parte basis of materials which accompanied his letters of May 23 and May 29, 1957, to the Board at the time such transmittals were made.

By Order E-11493, adopted June 26, 1957, the Board denied American's motion for an expedited hearing on that portion of its application in Docket 5903 which would authorize it to provide nonstop service between New York/Newark and San Francisco/Oakland. However, by this same order the Board directed its staff to prepare a study of the New York-San Francisco service pattern and to submit the results of its study to the Board on or about December 1, 1957, so the Board could examine the public need for a hearing on the issue of the proposed nonstop service.

There are over 400 pages of communications in the Board's public correspondence file of the nonstop proceeding . Between the time that American filed its motion for severance and an expedited hearing on May 3, 1957, and the time this motion was denied on June 26, 1957, the Board received 77 separate significant communications from the Mayor of San Francisco, from numerous Members of Congress, from State and city officials, chambers of commerce and other community organizations as well as from certain private individuals -- a large part of them urging that a hearing be held on American's application. This period accounts for 221 pages of the total correspondence in the public correspondence file of the nonstop case. Of these 221 pages of correspondence during this period, 131 pages represent communications to the Board and 40 pages represent acknowledgments by the Board or a member of its staff to communications received by the Board. Enclosed in the communications from the Mayor of San Francisco were 41 pages of resolutions of various outlying municipalities in the Bay area and clippings from Bay area newspapers similarly urging the holding of hearings in this matter. Although in working in cooperation with San Francisco on the problem of obtaining a hearing on the nonstop issue American had access to and knowledge of many of the communications sent to the Board between May 3, 1957, and June 26, 1957, few of these communications were formally served on TWA, United, or American. These communications were simply placed, together with the Board's routine letters of acknowledgment, in the public correspondence file in Docket 5903, the docket then containing American's application.

The total correspondence in the nonstop proceeding consists of approximately 134 separate communications to the Board. The correspondence file was at all times during the nonstop proceeding open to the public in the Docket Section of the Board.

With the denial of American's motion for severance and expedited hearing by a unanimous Board on June 26, 1957, and the Board's order of an informal staff study of the same date on the possible need for a new nonstop proceeding,[35/] the fight on the part of American and San Francisco for the early activation of that portion of Docket 5903 proposing San Francisco-New York nonstop service entered a new phase. This phase of the struggle would continue until January 13, 1958, when the Board, by a divided vote, entered its order[36/] activating the nonstop proceeding which is the subject of this reopened inquiry.

In a lengthy letter dated July 3, 1957, sent to each of the Board Members, the Mayor of San Francisco expressed deep concern over the Board's denial of American's motion. After noting that the Board had instructed its staff to complete

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35/ Order E-11493. Pursuant to its plan, the Board sent a top-level analyst of its Bureau of Air Operations to San Francisco to make a study of the public interest in an early hearing on the nonstop issue. This study was completed in late 1957 but it was not disclosed to any party to the proceedings under Docket 9214 save that of the Bureau of Air Operations.

36/ Order E-12103.

a study of the air service pattern between San Francisco and New York on or about December 1, 1957, the Mayor's letter concluded as follows:

> "However, since the Board has concluded that an additional study is required, we urge a review of the time allotted for the completion of the study and propose that it be completed by no later than September 3. Also, the extreme importance to San Francisco establishes our right to participate in such a study.
>
> "Certainly a study of San Francisco's most pressing air need would not be complete without the views of the community most vitally affected and in no event should such a study be made on an ex parte basis. Therefore, we request a date on which we may sit down with the Board and its staff to discuss this problem, and we also request the Board to specify what additional information San Francisco may supply on this subject. Finally, we urge the members of the Board and its staff to visit the City of San Francisco to explore this problem with interested civic groups and individuals."

The Mayor's letter was received by the Board on July 5, 1957, and it was placed in the public correspondence file of Docket 5903. On July 11, 1957, the Chairman of the Board wrote Mayor Christopher stating that the Mayor's letter of July 3 was in effect a petition for reconsideration of the order denying American's motion and informed the Mayor that to the extent the letter constituted a request for reconsideration of the Board's order "it should be filed in conformity with the Rules of Practice with copies being served on other parties to the case." The Mayor then refiled his letter of July 3 showing service upon TWA, United, American, Oakland and the Port of New York Authority. This letter was then placed by the Board in the pleadings file of Docket 5903.

Between the dates of June 26, 1957, when American's motion was denied, and January 13, 1958, when the Board reversed itself on the question of the need for a new nonstop proceeding by another divided vote, a further group of documents was filed with the Board and placed in the public correspondence file.[37/] Aside from Board acknowledgments of these or earlier communications, the correspondence file shows some 16 important communications to the Board during the period just noted. Fourteen of such communications were from Members of Congress either urging that a hearing be held or else transmitting letters from constituents without comment or with a request for advice from the Board as to the procedural status of the proposed nonstop proceeding.[38/] In addition to the letter from the Mayor of San Francisco of July 3, 1957, which was refiled with the Board on July 22, 1957, at the request of the Chairman of the Board, several other direct communications to the Board were placed in the correspondence file. On July 17, 1957, the Redwood City Chamber of Commerce filed a letter with the Board urging the holding of an expedited hearing on the nonstop question and on November 27, 1957, the San Francisco Labor Council filed a wire with the Board also asking that hearings be held.

[37/] The public correspondence file during the period noted above accounts for 44 more pages of material in the file.

[38/] Regarding the resolutions already referred to which were filed by the city councils, chambers of commerce or county boards of supervisors in the outlying municipalities in the Bay area at the instance of either San Francisco or American, the great majority of such resolutions had been filed with the Board prior to the denial of American's motion on June 26, 1957. The resolution of the Richmond Chamber of Commerce was dated June 12, 1957, but it was not received by the Board until July 1, 1957. As in the case of the other resolutions filed, the resolution of the Richmond Chamber of Commerce endorsed the action taken by San Francisco through its PUC in supporting the motion of American and indicated that the resolution was being filed not only with the Board but with certain Members of Congress from California.

In a letter dated November 21, 1957, Hugh Gallagher, Chairman of San Francisco's Mayor's Committee, wrote to Sherman Adams at the White House calling Adams' attention to the efforts of Northern California to obtain immediate hearings on American's application. Attached to Gallagher's letter to Adams was a document entitled "Condensed Facts Sheet" which purported to be a summation of the salient facts in support of the request for an expedited hearing on the proposed third nonstop service between San Francisco and New York. Gallagher's letter and the attachments were received at the White House on November 25, 1957, and on the same day Adams wrote a brief transmittal letter to the Chairman of the Board conveying Gallagher's letter and the attached "Condensed Facts Sheet" to the Board without comment. The transmittal note of Adams and the attachments thereto were received by the Board on December 2, 1957.

Adams acknowledged Gallagher's letter of November 21 with a reply dated November 25, 1957. The relevant portions of this reply to Gallagher read as follows:

> "Thank you for your letter of November twenty-first concerning a hearing before the Civil Aeronautics Board on an application for a third nonstop air carrier between San Francisco and New York.
>
> "As you know, with respect to purely domestic matters, the Board was purposely established by the Congress as an independent quasi-judicial agency so that its decisions would be free of executive influence or interference. However, I will be glad to make a copy of your letter and the enclosed fact sheet available to the Board Chairman."

The "Facts Sheet" which found its way into the Board files on December 2, 1957 via the White House was prepared jointly by Strickler and Needles. There was an edition of the "Facts Sheet" which was furnished by American to San Francisco as early as 1956; but this edition was revised from time to time by Strickler and Needles. The Mayor of San Francisco had mailed the "Facts Sheet" to various Members of Congress from the State of California.[39]

On February 11, 1958, after the activation of the nonstop proceeding on January 13, 1958, Barbour sent a memorandum to Strickler attaching a summary of various data on the nonstop problem, in almost identical form as the "Condensed Facts Sheet", as a proposed "memorandum to editors" of the San Francisco Bay area press. However, the record fails to show whether or not the proposed memorandum was actually circulated to the press.[40]

On November 2, 1957, C.R. Smith, President of American, visited San Francisco and on that trip remained in that City for three days. Smith was then returning from Seattle where he had met with the officials of the Boeing Airplane Company regarding the progress being made on the Boeing 707 jet transport. Before going to Seattle Smith instructed Startup to arrange a luncheon for November 14th, to which luncheon there were invited bankers, businessmen, officials of the City and County of San Francisco and some members of the press. About 30 persons attended the luncheon as guests of American. After the luncheon, Smith made a brief talk to the guests and answered a number of questions about the new Boeing jet transport which American was in the process of acquiring. At the close of this discussion, Smith told his audience that American was planning to inaugurate transcontinental jet service at the earliest possible date; that American's plans were to inaugurate the first such service out of Los Angeles to New York; and that the possibility of San Francisco receiving this type of service would depend upon Board action on the carrier's San Francisco-New York nonstop application. After most of the luncheon guests had left and again later in the day at his hotel, Smith had brief meetings with some members of the Bay area press.[41]

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[39] At least in one instance a Member of Congress forwarded the Mayor's letter to the Chairman of the Civil Aeronautics Board along with the "Condensed Facts Sheet." It was received by the Board on December 9, 1957, and on December 12, 1957, the Congressman's letter was acknowledged by the Chairman of the Board and, in accordance with the Congressman's request, the correspondence enclosed by the Congressman was returned to him.

[40] Barbour received the underlying data for the above proposed "memorandum to editors" from Strickler.

A news story in the San Francisco News[42] on November 5, 1957, reported on the Smith luncheon. Among other things, Smith was reported as saying that American had planned to inaugurate West Coast jet service with a Boeing 707 jet transport sometime in January 1959; that the first jet flights would be from Los Angeles to New York; and that San Francisco's chances of getting the first jet flights hinged entirely on whether the Civil Aeronautics Board would grant American nonstop authority between San Francisco and New York. The newspaper article of November 5, 1957, also stated that Smith urged San Francisco officials to press their efforts for a hearing on the nonstop matter because "you have to keep hammering * * * if you want to get anywhere." Smith was also reported by the same news story to have said that if the nonstop route was not granted, San Francisco would see jet service on the San Francisco-Chicago run by late February 1959. The entire record in this matter, including the testimony of C.R. Smith, leaves no doubt that Smith's comments to his luncheon guests and to the press on the day of the luncheon were approximately as related above.

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[41] The kind of luncheon meeting had by American in San Francisco on November 4, 1957, regarding the attributes and imminence of jet transport service was not unique to that City's situation. This was a continuing project on the part of the carrier for the large cities it served. Similar meetings were held by Smith or other American officials with respect to the carrier's jet equipment program in Los Angeles, Dallas, Chicago and other points.

[42] The San Francisco News later merged with the San Francisco Call-Bulletin and the newspaper is now known as the San Francisco News-Call Bulletin.

Smith himself took no direct part in directing the activities of the carrier's personnel in the Bay area in trying to enlist support for American's motion for an early hearing. These activities were under the executive direction of C. W. Jacob, and Jacob reported to Smith from time to time on the progress of these activities.

It should be noted that during this time no motion with respect to American's nonstop application was actually pending before the Board. The carrier's motion for severance and an expedited hearing had been denied on June 26, 1957. As already stated, the Board had simply announced that it would make a study of the San Francisco-New York service pattern through its staff and that study was due on or about December 1, 1957. Moreover, no one of the later parties to nonstop proceedings had yet sought intervention in Docket 5903.

Shortly after the Smith visit to San Francisco, the City and County of San Francisco sent a delegation to Washington to have an informal conference with the Board, arranged by certain Members of Congress from California. This conference was held on December 2, 1957.[43] A transcript of the conference was made available to anyone desiring it. The whole conference covers only 17 pages of transcript. The conference was publicized in the trade press and the contents of the transcript of the conference were made available and were promptly made known to TWA and United.

San Francisco was represented at the conference by Joseph W. Martin, Jr., then Chairman of the PUC of the City and County of San Francisco, and by Albert E. Schlesinger, then President of the San Francisco Downtown Association.[44] Shortly before the date of the conference a San Francisco newspaper reported a statement by Martin to the effect that the Board would have to be "pressured" and that the City was going to hire a "lobbyist" to advance its interests in the nonstop matter.

The man engaged by the City was Donald W. Cleary who preceded Martin and Schlesinger to Washington and acted as a sort of guide for and adviser to the San Francisco delegation. Cleary's normal job is that of serving as a legislative representative for the City of San Francisco in Sacramento. Cleary's principal contacts in Washington regarding the nonstop matter were with Members of Congress from California and New York. Before leaving for Washington, Cleary was briefed in San Francisco on the nonstop problem by Strickler at the request of Martin.

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[43] It has been the established policy of the Board to have such informal presentations by municipalities as to their general needs for improved air service. For example, similar conferences have been held by the Board in the past with representatives of Orlando, Houston and Reno. Indeed, United, one of the complaining carriers regarding the off-the-record matters in the New York-San Francisco nonstop proceeding, recently took part in such a conference with the Board relating to the proposed merger of United with Capital Airlines. During this conference, United's President was allowed to comment on the merits of the merger proposal to a limited extent.

[44] Schlesinger is a San Francisco businessman who served as President of the Downtown Association during the years 1957 and 1958.

At the beginning of the conference on December 2, 1957,[45] the Chairman of the Board, James R. Durfee, apparently very angered by a story appearing in the San Francisco Examiner on November 21, 1957, to the effect that the Board would have to be "pressured" and that the City was hiring a "lobbyist" to advance its[46] cause, made clear to the San Francisco delegation that the Board would only discuss the City's general aviation problems and that it could not under any circumstances discuss on an ex parte basis any specific application for service to and from San Francisco then pending before the Board. Indeed, the Chairman stated to the San Francisco delegation that if the Board's willingness to enter into such a conference was to be characterized "as an opportunity to turn on pressure" he would terminate the conference right then and there. Mr. Martin thereupon explained:

> " . . . the word 'pressure' was undoubtedly a silly word to use. However, I meant to say, and I did say time and time again during this long procedure that what we were trying to do was to get the interest of San Francisco before the Board in the most effective and legitimate way which I believe is traditionally the representations of our Congressmen and Senators to the Board.

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[45] In addition to the Chairman, three other Board Members and the San Francisco delegation of two representatives, the conference was attended by six members of the Board's staff.

[46] A similar story appeared in the San Francisco Chronicle on November 21, 1957.

> "If any error has been made, it is my error and I certainly hope the people of San Francisco and Northern California will not be penalized by my error. This hearing [a hearing before an agency of San Francisco where Martin made the statement] actually occurred some two or three weeks ago. There was a subsequent hearing before the Board of Advisors. I corrected this mistake, but I am willing to make any type statement the Chairman thinks in order to clarify what I said and to explain it, and if necessary to apologize to the Board."

The remainder of the conference consisted of a generalized discussion of San Francisco's desire to have the Board give attention to its need for additional transcontinental nonstop service to New York. Certain of San Francisco's other air service problems were also generally mentioned. However, at one point in th conference Chairman Durfee asked Martin whether he would be willing to make an a propriate correction to statements in the newspapers which carried the "pressure" and "lobbyist" story.[47] Martin responded by saying that he would be willing to make any type of statement that the Chairman thought in order to clarify what he had said and to make apologies to the Board if necessary.

The San Francisco delegation was shocked by Chairman Durfee's reprimand and by the cool reception it received at the hands of the Board. After the conference, Martin met with Senator Kuchel of California and the Senator and he prepared a statement for the San Francisco press making clarification of San Francisco's approach to the nonstop problem as reported in the press prior to the conference.[48] Martin asked the San Francisco press to publish it as an explanation and correction of his earlier remarks as reported in the San Francisco press and at least one of the San Francisco daily newspapers did publish the explanatory story on the morning of December 3, 1957.

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[47] The "pressure" and "lobbyist" story had also been reported in a Washington aviation trade journal prior to the convening of the conference.

[48] On the evening of December 2, 1957, Martin, Cleary and Schlesinger met socially at a dinner with Shipley and Strickler in Washington.

Even more surprising than the numerous ex parte communications which deluged the Board offices between May 3, 1957, and the date of San Francisco's informal conference with the Board on December 2, 1957, which preceded the Board's reversal on January 13, 1958, of its previous order denying an expedited hearing on American's proposal, were the reactions to that reversal in the Bay area press and among the officials of San Francisco and American. In letters to Martin and Schlesinger, both of which were dated December 5, 1957, C. W. Jacob found Martin's presentation of December 2, 1957, "just right" and "effective" and Jacob congratulated Schlesinger on his "effective representation" of San Francisco before the Board on December 2, 1957. On January 14, 1958, the San Francisco Examiner termed the Board's order activating the nonstop proceeding "a clear victory for San Francisco city officials who had lobbied vigorously for just that decision." Martin credited the result to the "efforts of Senators Knowland and Kuchel and Representatives Mailliard and Shelley . . . . the Mayor, the Board of Supervisors, the San Francisco Chamber of Commerce, the Downtown Association, business and labor organizations and our Public Utilities Commission." The San Francisco Chronicle of January 15, 1958, described the decision "a sweet victory to many Bay area political groups and civic leaders" and noted Cleary's mission "to organize support for the hearing." In remarks made to the Board of Directors of the Downtown Association of San Francisco on July 16, 1958, Strickler stated that the Board's action was the fruit of "the untiring, united and unparalleled efforts put forth by your city government, the Chamber of Commerce, the newspapers and this very Association. . . ."

The next stage in the development of the record in the nonstop proceeding thus begins on January 13, 1958, when the Board, by Order E-12103, with two members dissenting, activated the New York-San Francisco Nonstop Service Case by severing from American's application in Docket 5903 that portion relating to the San Francisco-New York nonstop issue, assigning it Docket 9214, and ordering an expedited hearing thereon.[49] By Order E-12337, dated April 9, 1958, the Board denied, again by a divided vote, the petitions of TWA and United for reconsideration of Order E-12103. By Order E-12511, the Board on May 15, 1958, consolidated into the proceeding under Docket 9214 an application of Northwest Airlines filed on April 29, 1958, requesting New York-San Francisco nonstop authority.

A prehearing conference in the new proceeding under Docket 9214 was held on April 29, 1958, before Examiner Bryan. The Examiner's Report of that conference was served on the parties on May 6, 1958, and in that Report the Examiner established July 8, 1958, as the date for public hearings in the matter. In addition to the two applicants, American and Northwest, the following others

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49/ After the nonstop proceeding was activated on January 13, 1958, the correspondence file in Docket 5903 became a part of the correspondence file to be maintained in Docket 9214.

were made formal parties to the nonstop proceeding: the Port of New York Authority; the City and County of San Francisco; San Francisco Chamber of Commerce; the Oakland Chamber of Commerce and the City of Oakland; TWA; and United.

After the announcement in the Examiner's Report of Prehearing Conference that public hearings were scheduled to begin on July 8, 1958, it became evident that several of the parties would not be able to prepare their exhibit material and their written testimony in time to go to hearing by that date. Accordingly, by Notice dated June 16, 1958, the Examiner upon request of the Bureau of Air Operations of the Board and United postponed the hearings to July 29, 1958. Thereafter, because of some difficulties in obtaining a hearing room for the public hearings on July 29, 1958, the hearing date was further postponed until July 30, 1958. As already noted, hearings were held by the Examiner on July 30-31 in San Francisco and on September 9-18, 1958, in Washington. Considering the complex issues and momentous private and public interests involved in the proposals for nonstop authority between San Francisco and New York on the part of American and Northwest, it is found that the hearing schedule achieved by Examiner Bryan in this matter met the Board's requirement of an "expeditious hearing" as directed by Order E-12103.

Of the remaining 100 or so pages of the public correspondence file in the nonstop proceeding under Dockets 5903 and 9214, about 30 pages are dated between January 13, 1958, and March 9, 1959, when the Examiner issued his Initial Decision.[50]

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[50] One of the 30 pages of correspondence is an acknowledgment by the Board dated March 11, 1959, of a letter received prior to March 9, 1959.

After the activation of the nonstop proceeding and prior to the Examiner's Initial Decision thereon, 14 pages of the public correspondence file represent direct communications to the Board; the remaining pages in the main represent letters of acknowledgment from the Board to these or earlier communications. One of those pages of the correspondence file is a telegram of June 23, 1958, from the Mayor of San Francisco expressing concern to the Board over the postponement of the hearings from July 8 to July 30, 1958, and requesting that the hearings be concluded in the month of July 1958. This telegram of Mayor Christopher was the only instance after the activation of the nonstop case of an ex parte communication from a formal party to the proceeding.

The remainder of the above 14 pages of correspondence consists of 12 communications from Members of Congress from either the State of California or from the New York area. These communications may be summarized as follows: (1) Letter dated May 12, 1958, from Congressman Shelley inviting the Board to hold hearings in San Francisco; (2-3) transmittal slips from Congressman Shelley dated June 24, and from Senator Knowland dated June 25, forwarding copies of the telegram to the Board from the Mayor of San Francisco referred to above; (4) telegram dated June 27 from Senator Kuchel supporting the Mayor's telegram; (5) letter dated June 27, from Congressman Mailliard enclosing certain "pertinent information" on the nonstop issue and expressing concern over delays in the hearing schedule; (6-7) letters dated February 3, 1959, from Senator Engle and Congressman Younger each enclosing a letter received from the Mayor of San Francisco and asking advice as to the status of the case; (8) letter dated

February 9 from Congressman Cohelan stressing the importance to San Francisco of jet service and urging that the case be expedited; (9) letter dated February 10 from Congressman Clem Miller urging that the case be expedited and requesting advice as to when a decision might be expected; (10) letter dated February 16 from Congressman Johnson of California stating his interest in an early decision; (11) letter dated February 24 from Congressman George Miller requesting that he be permitted to appear at the oral argument; and (12) letter dated March 3, 1959, from Senator Case transmitting without comment a letter from the Rona Travel Service, Passiac, New Jersey, which the Senator received on March 6, 1959.

In the field of public relations after the activation of the nonstop case, Barbour, as the head of the carrier's press and public relations department in San Francisco, continued to do about what he had done during the pendency of the Denver proceeding. He circulated to the press a wide variety of material bearing directly on the merits of the issues involved in the nonstop proceeding. Thus, on June 12, 1958, Barbour circulated a press release in behalf of the carrier outlining in general the carrier's proposal in the nonstop proceeding and stressing again that the carrier would inaugurate transcontinental jet transport service out of San Francisco about the same time it began such service out of Los Angeles if American's nonstop application were approved. This press release summarized the carrier's exhibits filed on that day in the nonstop proceeding with regard to the kind of schedules the carrier proposed to inaugurate between San Francisco and New York. It is also "plugged" the Boeing 707 jet transport which the carrier was in the process of acquiring.

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On July 14, 1958, Barbour circulated a comprehensive "memorandum to editors" to the daily press in the Bay area which purported to be a more extensive summary of the exhibits of American Airlines in the nonstop proceeding and covered, among others, such subjects as proposed schedules, proposed passenger fares and airfreight tariffs, projected traffic participation on the assumption of three carriers in the nonstop market, and estimates of diversion of traffic from TWA and United, thereby arguing the cause of the carrier's application in terms of the various criteria of air carrier choice. The foregoing "memorandum to editors" also reported "summaries" of exhibits of United and TWA and for the most part the latter summaries were critical of the positions of the two carriers then in the San Francisco-New York market in the nonstop proceeding.[51] On September 5, 1958, Barbour circulated another "memorandum to editors" to the Bay area daily press which, among other things, set forth the name of the Examiner handling the nonstop proceeding, the parties to be heard, and a chronology of the procedural steps already taken in the nonstop case. This memorandum also contained much argumentative material on the merits of the nonstop issue.[52]

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[51] The "memorandum to editors" of July 14, 1958, was intended to furnish the background information to the Bay area press for the civic portions of the hearings which were held in San Francisco on July 30-31, 1958.

[52] The "memorandum to editors" of September 5, 1958, was intended to supply background information to the Bay area press for the air carrier portion of the public hearings which were held in Washington on September 9-18, 1958.

American's policy of providing press releases, memoranda to editors, and handouts bearing directly on the merits of the issues involved in the nonstop proceeding after its activation and before final decision thereon was basically no different than the policy followed by other air carriers in the industry in similar circumstances. As already noted, American had followed a similar policy with respect to pending litigation in courts of law. When asked, however, whether he would furnish the press in the Bay area with materials bearing on the merits of pending litigation involving American in a court of law in San Francisco, Barbour replied that he would not furnish the press such material. When asked to explain the difference in his attitude toward litigation before the Civil Aeronautics Board and litigation involving his carrier before a court of law, Barbour replied as follows:

> "Well, it was my understanding very early that the Civil Aeronautics Board is a quasi-judicial agency but also an arm of Congress, that is, it carries out the legislative directives of Congress. In its judicial aspects, it has the same privileges as a court of law . . . . being an agency of the Congress, matters pertaining to commercial aviation might logically be brought to the attention of the general public .... through the newspapers and in turn might possibly be noticed by their legislative representatives."

When queried as to the object of all the releases and background information given to the Bay area press which in some instances was the identical information contained in the carrier's exhibits and in the formal record upon which the Civil Aeronautics Board would make a decision in the matter, Barbour replied as follows:[53]

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[53] As the only competing applicant for the nonstop authority between San Francisco and New York, Northwest followed a policy similar to that of American in providing information to the press on the merits of the nonstop issue.

> "Well, to assist the newspaper men in covering a matter of general public interest in the San Francisco Bay area."

On June 25, 1958, Bone, then Regional Vice President of Sales for American in Los Angeles, sent the following memorandum to Shipley at his office in Washington:

> "In line with our discussions about getting better established with the top people in San Francisco, Elmo and I had a luncheon at the Bohemian Club last Thursday for Al Schlesinger, President of the Downtown Association, Lee Ettelson, Publisher of the Call-Bulletin, Dion Holm, City Attorney, our friend Frank Needles, Deputy City Attorney, and Dick Pearce, editorial writer for the Chronicle. Since our interests in San Francisco are common at the moment, we also had Bob Murray, Executive Vice President of Pan American, along, and Tom Barbour, of course, was there.
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> "It was set up to be an entirely social gathering, but by coincidence it happened to be set for the day on which the postponement of the SFO-NYC nonstop hearing was announced so there was much discussion about that, all with high indignation on the part of the good citizens of San Francisco.
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> "We called upon and Commissioned as an Admiral of our Flagship Fleet Charles Theriot, Publisher of the Chronicle, the same afternoon.
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> "The next day we had a luncheon in Oakland for Bob Flynn, President of the Oakland Chamber of Commerce, who is also Division Manager of Pacific Telephone and Telegraph Co., R. Stuart Moore, President of Los Angeles-Seattle Motor Express, Inc., and the most active and influential citizen of Oakland with regard to transportation matters, and George M. Keffer, Vice President and Manager of the Crocker-Angelo National Bank, Oakland.
>
> "As promised, we propose to have some sort of a get together with influential citizens each time I visit San Francisco, which is about once every three weeks on the average, and as discussed at the Sales Council Meeting in New York the other week, we shall get other officers of the company to participate in similar get togethers whenever possible."

As of the time of the above memorandum, George Elmo Coon was District Sales Manager for American in San Francisco. Coon aided Bone in contacting various persons in the Bay area regarding the nonstop case and in checking on prospective witnesses for the public hearings in the matter.

A copy of the above memorandum was sent to the carrier's headquarters in New York. Attached to the above memorandum, as sent to Shipley, were editorials appearing in the San Francisco Examiner and the Call-Bulletin on June 23, 1958. These two editorials are discussed below.

As already noted in mid-June 1958, the Examiner handling the nonstop proceeding for the Board announced postponements of the public hearings from July 8 to July 30, 1958. These announcements kicked up a real storm in the Bay area press. A lead editorial entitled "CAB Fumbles Again" appearing in the San Francisco Examiner on June 23, 1958, lashed out at the Board for delaying the hearings as "a regulatory body mired in confusion and languor" and otherwise heaped inexcuseable abuse upon the Board's processes. The editorial appearing on the same day in the San Francisco Call-Bulletin entitled "CAB Pokes Along" was almost equally intemperate.

The June 23 editorial from the San Francisco Examiner was mailed to the Board by Congressman Mailliard of California as an enclosure of "pertinent information" on the nonstop matter with his letter of June 27, 1958, referred to above. This letter was received by the Board on July 1, 1958. Congressman Mailliard's letter was acknowledged by the Vice Chairman of the Board, Chan Gurney, on July 3, 1958, in which Vice Chairman Gurney went into painstaking detail to demonstrate that an earlier public hearing on the nonstop matter was virtually impossible if a fair hearing were to be afforded to each party to the proceeding. Virtually the same letter was sent by Gurney to certain other Members of the California Congressional delegation. In a letter dated July 22, 1958, the then Chief of the Board's Office of Information, William Kloepfer, Jr., wrote to the Editor of the San Francisco Examiner explaining, among other things, that because of the procedural processes that had to be observed by the Board, a proceeding such as the nonstop matter necessarily required some reasonable time to litigate. Aside from the Kloepfer letter and the letters of the Vice Chairman dated July 3, 1958, to Congressman Maillaird and other Members of the California Congressional delegation, little was done to support the Board from the unjust clamor and criticism of its procedures which followed the postponement of the hearings in the nonstop matter and against which a court of law is normally insulated.

American's efforts to have the merits of its nonstop proposal aired in the public press did not cease with the conclusion of the public hearings on the matter. In a memorandum dated November 13, 1958, addressed to A.A. Paradis, an Assistant Secretary of the carrier stationed in its New York headquarters, Taylor had various suggestions for Paradis as a possible agenda for a forthcoming top-level staff meeting to be held in New York. Among the suggestions made by Taylor were the following:

> "Community Affairs work to build groundwork for publicity in San Francisco upon release of the Examiner's decision, New York-San Francisco, Nonstop. This should come out around December 10th. Full impact of the publicity should go to the CAB and pertinent legislators through proper channels." (Emphasis supplied).

Taylor had been aware that the nonstop proceeding was getting a great deal of newspaper publicity in the San Francisco area and he hoped that some of the press coverage would come to the attention of the Civil Aeronautics Board. To the extent his use of the phrase "through proper channels" intended to apply to the Board, it was, of course, a contradiction in terms. Taylor knew that there were no "proper channels" to the formal record at the

Board for publicity efforts by a carrier in a new route proceeding. Taylor also hoped at the same time that some of the press coverage on the nonstop proceeding would also come to the attention of Members of Congress in Northern California. Except for a request of Strickler by Congressman Shelley of California for certain materials appearing in the San Francisco press for use in oral argument before the Board as hereinafter discussed, there is no evidence that American actually caused any of the press stories or editorials appearing in the San Francisco daily press to be sent to the Civil Aeronautics Board or any Member of Congress from the State of California.

As in the case of courts, a regulatory tribunal is hardly in a position to defend itself from unwarranted furor and unjust condemnation. In the situation which developed with the Civil Aeronautics Board in the case of the nonstop proceeding, there is nothing in the record to show that American's personnel, either official or non-official, did anything to protect the Board from the abuses visited upon it during the processing of the nonstop proceeding. On the contrary, there is considerable evidence in the record to demonstrate that the carrier agitated various persons in the Bay area in the matter of not only setting a hearing out of turn on the nonstop issue but also in the matter of the time it took to render a final decision in the nonstop proceeding. There is no evidence, however, to show that the lawyers representing American in the nonstop case failed in any way in their duty to the Board in the various phases of the litigation in the nonstop proceeding in maintaining that respectful attitude toward the Board which is expected of the

Civil Aeronautics Board practitioners and of lawyers in general. Nor is there anything in the record to show that the lawyers for the carrier in the nonstop case encouraged any of the ex parte argument which found its way into Board files.

Briefs to Examiner Bryan in the nonstop proceeding were filed with him on November 10, 1958. As already noted, his Initial Decision was rendered on March 9, 1959. Again, considering the complex and controversial issues involved in the proceeding, including, among others, the impact of the operation of jet-type aircraft in a market the size and importance of that involved in the case, it is found that Examiner Bryan met the Board's direction for an "expeditious" disposition of the matter.

Thomas J. Mellon, Vice President and General Manager of the Wessix Electric Heater Company in San Francisco, has since the year 1957 been a past President of the San Francisco Chamber of Commerce and also a member of the Mayor's Committee of San Francisco. From January 1957 to September 1959, Mellon discussed the nonstop proceeding with various American Airlines personnel, principally with Shipley.[54]

Under date of January 30, 1959, Shipley wrote the following letter to Mellon, copies of which were sent to Jacob in New York and Taylor in Washington:

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[54] Among the many persons in the Bay area with whom Mellon discussed the nonstop matter were various City officials and Congressmen Mailliard and Shelley. Mellon also discussed the nonstop matter with Senators Kuchel and Engle of California. Upon being informed by the PUC that certain California Congressmen, as well as Senator Engle, planned to appear at oral argument before the Board, the PUC asked Mellon to induce Kuchel to also appear. Senator Kuche had a definite policy of not appearing before administrative tribunals but he promised Mellon that he would do what he could in behalf of San Francisco in th nonstop case.

"It was very good to hear from you and thoughtful of you to write about the 'First Flight Cover.'

"We were of course very disappointed that C.A.B. had not acted in time to permit the start of the San Francisco-New York jet service at the same time as the Los Angeles service was inaugurated. Although our whole program of jet introduction was slowed down for reason of the strike, we are still hoping to start the San Francisco-Chicago-New York service with the 707 Jet Flagship on March 1.

"I am at a loss to understand the reasons for the continuing delays in the C.A.B. proceeding. The Examiner has the reputation for issuing his initial decisions promptly, yet the hearing was closed and the case submitted to him 2½ months ago. There is some indication that his report will not be issued for another month or two. It is difficult to escape the conclusion that the delays have been directed from the Commission itself. If this conclusion is true, San Francisco is being miserably discriminated against. (Emphasis supplied).

"I have not been on the West Coast since October, but am hoping to get out before too very long. When I do, I shall look forward to a visit with you. If you should come East, I do hope you will let me know."

The above letter was written in response to an inquiry of Mr. Mellon whom Shipley considered a good friend. At the hearing in this reopened inquiry, Shipley denied that he was trying to spread the impression to the people of Northern California that the Board was intentionally delaying the disposition of the nonstop case. Shipley's credibility is beyond question. What Shipley had in mind was that the overall time between the date of the filing of American's motion on May 3, 1957, and the issuance of the Examiner's Initial Decision was intolerably long and that the Board was in part accountable for that time lag. But the unfortunate juxtaposition of his speculation upon the reason for the lack of an Initial Decision as of January 30, 1959, as emphasized above was most misleading.

Both Shipley and Taylor had numerous conversations with certain Members of Congress during the years 1957 through 1959 concerning the nonstop proceeding. In the majority of the contacts with Members of Congress by Shipley and Taylor regarding the nonstop question, such contacts were with Members of Congress from the New York area and from the State of California. In some instances such contacts were initiated by the Member of Congress or his assistant; in other and much more frequent cases, Shipley or Taylor introduced the subject of the nonstop proceeding to various Members of Congress from California, New York, and New Jersey and Connecticut.

In line with the carrier's policy of keeping the Members of Congress advised on new route developments affecting constituents, Shipley and Taylor had numerous personal visits with selected Members of Congress. For example, Shipley personally visited with Senator Kuchel of California after the Board issued Order E-11493 on June 26, 1957, which for a time denied American's request for an expedited hearing, for the purpose of advising the Senator of the Board's action and to inform him of the carrier's disappointment over its initial failure to obtain a new nonstop proceeding. Prior to the denial of that motion, Shipley had discussed the nonstop issue with the Senator's Assistant. During the summer of 1957 Shipley also saw Senator Knowland of California to outline to the Senator the probable benefits of American's proposed nonstop service between San Francisco and New York. Among other Members of Congress visited in person by Shipley were Congressmen Shelley of California in the spring of 1957 and on frequent occasions thereafter; Congressman Mailliard of California in November 1957;

and Congressman Younger of California in late 1958. Each of the foregoing Senators and Members of the House in Congress had written to the Board at one time or another during the years 1957 through 1959 relative to some aspect of the nonstop proceeding and in some instances carbon copies of those letters were sent to Shipley.

As the carrier's liaison man with Congress during the year 1957 and most of the year 1958, Taylor, of course, had numerous legislative matters to discuss with individual Members of Congress and appropriate Congressional committees, including, among others, the proposed revision of the Civil Aeronautics Act of 1938, certificates for supplemental air carriers, problems of air traffic control, proposed postal rate increases and various pending bills regarding taxes. Although Taylor contacted several Members of Congress with respect to American's motion as filed on May 3, 1957, most of Taylor's contacts with Members of Congress regarding the nonstop matter took place after the conclusion of the public hearings in the case. In these latter contacts Taylor was primarily interested in apprising Members of Congress from the State of California and from the New York area of the oral argument before the Board in the proceeding in the expectation that such Members of Congress would submit either oral or written argument in support of American.

Before oral argument, Shipley called Robert Smith, American's metropolitan sales manager in New York, and asked Smith if his sales representatives, in the course of their regular sales' duties would encourage some of their accounts to write their Congressmen asking them to appear at oral argument. Thereafter, as shown below, sales representatives of the carrier in the New York area were asked to contact travel agents and large users of American's service to have the latter write to Members of Congress of their interest in the proceeding.

In March-April 1959, following the issuance of the Examiner's Initial Decision, American through Taylor contacted several Congressmen from the New York metropolitan area in an effort to obtain support for the carrier's position in the nonstop proceeding. These Congressmen were advised that they could personally appear at oral argument before the Board or that they could express their views to the Board in writing. No caveat was expressed by Taylor to the Congressmen with regard to sending copies of any communications to other parties to the proceeding. As a result of Taylor's activities, a number of communications from Members of Congress were received on the merits of the issues and acknowledged by the Board. In at least one instance, a communication from a Member of Congress on the merits had been composed by a representative of American.

Oral argument before the Board on the merits of the applications of American and Northwest for San Francisco-New York nonstop service under Docket 9214 et al. was held on April 29, 1959. The following Members of Congress personally appeared and took part in that argument: John F. Shelley, George Miller, J. Arthur Younger, John F. Baldwin, John F. McFall, Jeffery Cohelan, Harold T. Johnson, Clement W. Miller, and William S. Mailliard, as representatives in Congress from the State of California; Eugene J. Keogh, Isadore Dollinger, Francis E. Dorn, and Robert R. Barry, as Representatives in Congress from the State of New York; and Francis X. Dooley, representing Senator Dodd of the State of Connecticut.[55]

As the argument opened, the Chairman announced that Senators Engle and Kuchel of California, Congressmen John E. Moss of California, Victor L. Anfuso of New York and Frank Osmers of New Jersey had submitted written statements of their respective positions with respect to the issues of the case. And during the argument Congressman Shelley of California submitted statements from Congressmen Harlan Hagen and Charles S. Gubser of California on the merits of the nonstop question.

The remaining pages of communications in the public correspondence file of the docket in the original nonstop proceeding bear dates from March 23, 1959, two weeks after the Initial Decision was issued, through April 29, 1959, the date of the oral argument before the Board, except for three communications which were received by the Board after the conclusion of oral argument. In these pages there are approximately 20 separate significant communications to the Board. The rest of the pages consist primarily of letters of acknowledgment to these or earlier communications.

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[55] Except for Congressmen Gubser, Hagen and Dorn, each of the above-named Members of Congress, including Senator Dodd, was personally contacted by Shipley or Taylor or Strickler at one time or another during the pendency of the nonstop proceeding before the Board. Other Members of Congress were also contacted by American with reference to the nonstop matter. As already noted, the Examiner's Initial Decision was issued on March 9, 1959. The Notice of Oral Argument before the Board was issued on April 3, 1959. On April 13, 1959, at the invitation of Congressman Sisk of California, Taylor and Strickler attended a luncheon in a Washington hotel with Sisk and several other Members of the California delegation to the House of Representatives where the nonstop proceeding was discussed. In general, the discussion of Taylor and Strickler with the Congressmen related to the issues of the nonstop proceeding, the positions of the various parties to the case and the fact that oral argument before the Board would soon be held.

The 20 important communications received by the Board after the issuance of the Initial Decision may be summarized as follows: (1) Letter dated March 11, 1959, from Congressman Cohelan asking for permission to be heard at oral argument; (2-3) transmittal slip and a letter of transmittal from Congressmen Addonizio and Derounian, each dated March 23 and forwarding without comment a letter from a travel agent favoring American's application; (4) letter dated April 2 from Congressman Rooney transmitting without comment a letter from a travel agent favoring American's application; (5) letter dated April 9 from the Office of the Governor of California to the City Attorney for San Francisco enclosing a written statement by the Governor in lieu of oral argument and asking the City Attorney to forward the statement to the Board at the proper time; (6) letter dated April 22 from Senator Kuchel enclosing a statement of his position on the merits and requesting that the statement be received under Rule 14;[56] (7) letter dated April 22 from Congresswoman St. George stating her position on the merits; (8) letter dated April 24 from Senator Engle submitting his statement under Rule 14;[57] (9) letter dated April 28 from the Chief Clerk of the California Assembly transmitting without comment Assembly Resolution No. 27 favoring a third New York-San Francisco

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56/ The letter was received by the Board prior to oral argument and as already noted, the Chairman of the Board specifically stated at the argument that the statement would be "included in the docket."

57/ As stated above, Senator Engle's statement was referred to by the Chairman at oral argument when he referred to Senator Kuchel's.

nonstop service;[58] (10-13) letters and statements dated April 28 from Senators Javits and Keating, and Congressmen Osmers, Anfuso and Wainwright stating their positions on the merits and, in all cases but one, specifically requesting that the letters or statements be received under Rule 14;[59] (14-17) letters and statements dated April 29 from Congressmen Moss, O'Brien, Sisk and Multer stating their views on the case and, in all cases but one, specifically requesting that the letter or statement be made a matter of public record;[60] (18) transmittal slip dated April 30 from Senator Keating forwarding without comment a letter dated April 25 from a constituent favoring American's application; (19) transmittal slip dated May 5, from A. J. Goodpaster of the White House forwarding without comment California Assembly Resolution No. 27 and a letter from Gerald D. Morgan of the White House to the Chief Clerk of the California Assembly acknowledging the receipt of the Resolution; and (20) letter dated May 7, 1959, from Senator Case transmitting without comment on the merits an undated telegram from a travel agent requesting that the Senator support American's application.

It has long been the practice of the Civil Aeronautics Board to permit the appearance of Members of Congress at oral argument before the Board on the issues involved in new route applications. Indeed, individual Board Members have in the past expressed interest in such argument by Members of Congress. As in the case of air carriers in other new route proceedings, certain of the officials of American Airlines arranged for considerable private electioneering in the nonstop case to induce the attendance of the various Members of Congress whose constituencies were affected by that proceeding.

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[58] The Resolution itself was read at oral argument by Congressman Johnson of California.

[59] The letter from Senators Javits and Keating inadvertently referred to the Rule as "Rule 13." The statements of Congressmen Osmers and Anfuso were referred to by the Chairman at oral argument when he referred to Senator Kuchel's.

[60] Congressman Moss' statement was also referred to by the Chairman at oral argument when he referred to Senator Kuchel's.

Thus, in regional sales meetings of the carrier's zone managers and sales personnel in the New York area held in the summer and fall of 1958, Taylor discussed American's pending route proceedings and suggested to sales representatives of the carrier that they contact their customers, including travel agents, for the purpose of having them write to their Congressmen urging them to appear at oral argument in behalf of American in the nonstop case. Similarly, during the early months of 1959 Shipley requested American's sales representatives in the New York area to contact travel agents and large users of the carrier's services for the purpose of having them write to their respective Congressmen requesting the Congressmen to appear at oral argument. Prior to giving the foregoing instructions, Shipley had been talking with Taylor and Taylor reported to Shipley that some of the Members of Congress with whom Taylor had discussed the matter indicated that it would be helpful to them if they had some expression of interest in the nonstop matter from their constituents. Shipley's specific instructions to the zone managers and the sales representatives of the carrier were to the effect that if any of the large users of American's service were willing to ask their Congressmen to appear at oral argument they were to be told by the carrier's zone managers and sales representatives to write to their respective Congressmen to that effect.

In answering Congressional inquiries as to what certain Members of Congress could do in the nonstop matter prior to the activation of the proceeding, both Shipley and Taylor suggested to individual Congressmen that they might write to the Board to endorse an early hearing. At no time in such contacts did either Shipley or Taylor advise the Congressmen contacted of the requirements of Rule 14 of the Board's Rules of Practice in Economic Proceedings.

The text of Rule 14 is set forth in Appendix B attached hereto. This Rule gives to any person not a party the privilege of appearing at any hearing (other than in an enforcement proceeding) and presenting relevant evidence, and of presenting a written statement on the issues involved in a proceeding to the Examiner or the Board, which statement is to conform to the requirements as to "form, content, service and time of filing" applicable to the briefs of parties. None of the correspondence to the Board by various Members of Congress urging a hearing on American's application for nonstop service complied with the foregoing requirements of Rule 14. It was the position of Shipley and Taylor that the Board's regulations as to the form, content and service of the documents were not applicable at that stage of the proceeding and that Congressional correspondence urging a hearing on American's application was appropriate in the circumstances and consistent with the Board's practice in other new route proceedings.61/

61/ It was Taylor's view that if he had gone to any Member of Congress and suggested that the Member's communications to the Board had to comply with the requirements of Rule 14 with respect to form, content and service to all parties to the proceeding, he "would have been laughed out of the room."

A further provision of Rule 14 allows certain public persons to participate in oral argument in any proceeding in which argument has been assigned. As already noted, Taylor apprised various Members of Congress, both in the New York area and those from the State of California, of the pending argument before the Board after the issuance of the Examiner's Initial Decision. In approaching Members of Congress to advise them that oral argument was pending in the nonstop matter, Taylor also advised them that they might submit a letter in lieu of appearing at oral argument. Again, it has long been the practice of the Board to accept written statements of Members of Congress for the record in lieu of oral argument on pending new route proposals. As already noted, a number of Members of Congress appeared in person at oral argument, while others submitted individual statements in lieu of oral argument. The communications submitted in lieu of oral argument either expressly referred to the Board's Rule 14 or were obviously so intended. Each of the Members of Congress who participated in the oral argument whether in person or by statement in lieu of argument supported the certification of a third nonstop carrier between San Francisco and New York.

Prior to oral argument, Congressman Shelley's office requested Strickler to furnish that office with a complete set of articles and editorials concerning the nonstop issue which had appeared in the daily press of San Francisco in order that the Congressman could present those press clippings to the Board at oral argument as evidence of the public interest in the Bay area in the nonstop proceeding. Barbour made the collection of clippings and gave them to Strickler for delivery to Congressman Shelley. At oral argument the

Congressman offered "a set of clippings from San Francisco newspapers discussing the need and importance of a third nonstop air carrier between San Francisco and New York." Chairman Durfee of the Board declined to receive the press clippings from Congressman Shelley with the statement that "we would be inclined to question the probative value of newspaper clippings."

At the oral argument, Congressman Younger of California stated that since May, 1957, he had aided San Francisco's effort to obtain a third nonstop air carrier to New York. Congressman Younger had not appeared at the hearing and his "aid" to San Francisco is unexplained in the record except for certain letters from the Congressman to the Board dealing in the main with the procedural aspects of the case and the need for a third nonstop carrier. During the oral argument, Congressman Younger strongly supported the Initial Decision of the Examiner which found that American should be selected as a third nonstop carrier between San Francisco and New York.

While the Members of Congress participating in oral argument on the nonstop issue made a better than usual attempt at discussing some of the evidence adduced at the hearing, not a single Member of Congress participating in that argument addressed himself to the real meaning of the facts before the Board. Thus, no Member of Congress attempted at oral argument to weigh the probable need for a third New York-San Francisco nonstop in terms of the drastically changed economics of the jet age which has wrought such a revolution in the productivity potential of carriers using turbojet aircraft. In its order activating the nonstop proceeding, the Board asked the applicants and intervening carriers to focus their proof on the impact of the operation of jet aircraft in a market of the size and importance involved in the case. Of course, no Member of Congress was either equipped to argue or expected to argue the facts attending the planned operation of turbojet aircraft in the market in question -- facts which the Board considered of primary importance in determining the economic practicality of three-carrier competitive service between San Francisco and New York.

As in the case of appearances by Congressmen in other new route proceedings, each member of Congress appearing before the Board in the nonstop matter argued for the certification of the proposed additional service for their respective home districts. The Congressmen uniformly endorsed the pleas of the San Francisco Bay and New York areas for the third nonstop service without analyzing any of the major fortifying or countervailing considerations bearing upon the ultimate issue of the probable public need for a third nonstop routing. Such analyses were left to the lawyers for the formal parties to the case who followed the Congressmen in the argument.

In addition to permitting the appearances of Members of Congress at oral argument before the Board as well as the appearances of State and Federal officials generally, Rule 14 of the Board's Rules of Practice in Economic Proceedings, permits the filing with both the Examiner and the Board of written statements on issues involved in the proceeding. As already found, several Members of Congress utilized the latter method of getting their views to the Board. Similarly, the record discloses that various chambers of commerce, boards of supervisors and other civic groups filed written statements on the merits of the nonstop matter with the Examiner and the Board.

The Manager of the Transportation Department of the San Francisco Chamber of Commerce, Charles C. Miller, contacted other chambers of commerce in the Bay area urging them to file a statement on the merits of the nonstop issue with the Examiner under Rule 14. Miller was careful to advise the outlying chambers of commerce in the Bay area to comply with the requirements of Rule 14 with respect to such matters as the number of copies required for filing and their service on other parties. A number of such statements by chambers of commerce in the Bay area were properly filed with the Examiner.

From the inception of the proceeding, the officials of San Francisco contacted and requested the support of various boards of supervisors in the Bay area. At least 13 of the Bay area County Boards of Supervisors filed statements on the merits of the nonstop issue under Rule 14 with the Examiner and the Board after the conclusion of the public hearings in the nonstop proceeding. Except for minor deficiencies, these statements generally complied with the requirements of Rule 14.[62/]

It has consistently been the practice of the Examiners of the Board and the Board itself to receive statements under Rule 14 on the merits of issues in a new route proceeding after the close of public hearings and in lieu of the filing of a brief to the Examiner or to the Board, even when such statements did not comply with the requirements of Rule 14 as to form, content, service and time of filing. It is this general practice which guided Miller

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[62/] Apparently, through inadvertence the resolutions of the County Board of Supervisors of San Mateo and Santa Clara Counties found their way into the Board's correspondence file in Docket 9214 et al. However, each of the latter resolutions directs the Chairmen of the two Boards of Supervisors to file with the Examiner and the Civil Aeronautics Board statements under Rule 14.

of the San Francisco Chamber of Commerce in contacting the chambers of commerce of the outlying communities in the Bay area after the close of hearings in urging them to file statements under Rule 14 with the Examiner and the Board. Miller has had long experience in participation before the Board in new route proceedings and it is his view that prior to the activation of the nonstop proceeding by Order E-12013, of January 13, 1958, there was no "case" pending before the Board, and that, accordingly, during the period between May 3, 1957, the date of the filing of American's motion, and January 13, 1958, the date of the Board's order assigning the nonstop matter for hearing, it was entirely proper for civic groups to send communications to the Board without service on other persons that might eventually have an interest in the proceeding.

TWA and United allege procedural improprieties and an attempt to pressure the Board on the part of the Mayor of San Francisco because of the Mayor's very frequent letters to the Board prior to the activation of the nonstop proceeding,[63] and because the Mayor's open solicitation of support from Senators, Congressmen and other public officials in attempting to obtain an expedited hearing on American's proposal for nonstop service.

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[63] In addition to many earlier letters, the Mayor sent a telegram to the Board on June 23, 1958, which protested the postponement of the hearings from July 8, 1958, to July 30, 1958. The Mayor also wrote a letter dated January 30, 1959, to various Members of Congress from the State of California expressing deep concern over the time the Examiner was taking in issuing his Initial Decision and voicing fears that the further procedural steps necessary before final decision by the Board would adversely affect San Francisco for the reason that the San Francisco-New York market was not getting nonstop jet service on or about the same date the Los Angeles-New York market received such servic Jet nonstop service was inaugurated between Los Angeles and New York on Januar 25, 1959. As a result of the Mayor's letter of January 30, 1958, at least tw Members of Congress from the State of California wrote to the Board regarding the procedural status of the nonstop proceeding.

Procedural improprieties and attempted pressure upon the Board have also been alleged by TWA and United against Joseph W. Martin, Jr., Chairman of the PUC of San Francisco during the early procedural stages of the nonstop proceeding. As already noted, Martin was primarily responsible for the wide circulation given to a resolution of the PUC in support of an early hearing which was adopted after the filing of American's motion. In addition to writing to Senators Kuchel and Knowland and Congressmen Shelley and Mailliard of California prior to the activation of the nonstop proceeding, Martin also wrote to George W. Milias, President of the California Republican Assembly, and to Mrs. Marjorie H. E. Benedict, a Member of the Republican National Committee from California during the same period and in each case expressed San Francisco's interest in an early proceeding on the nonstop problem. Martin expected that both Milias and Mrs. Benedict would write to Members of Congress from California. As a result of Martin's letters, both Milias and Mrs. Benedict wrote to Senator Kuchel asking for his help in San Francisco's effort to obtain a hearing on the nonstop question.[64]

Martin's correspondence with Members of Congress from California and with Milias and Mrs. Benedict was in each case accompanied by a copy of the resolution of the PUC supporting American's motion for an expedited hearing. This correspondence by Martin and the letters resulting from Martin's communications to Milias and Mrs. Benedict,[65] were sent shortly after the filing of American's motion and long before the activation of the nonstop proceeding on January 13, 1958. After the proceeding was set down for hearing, no Congressional support was sought by the PUC other than asking certain Members of Congress from California to appear at oral argument before the Board.

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[64] Martin, who has been active in Republican party affairs in California in recent years, also went to his friends in the Democratic party in California and requested that they write to their Congressmen asking for support of an early hearing on the nonstop issue. Whether as a result of Martin's efforts or for other reasons, a number of prominent Members of the Democratic party of California also wrote to the Board on the same issue.

Mayor Christopher and Chairman Martin of the PUC were both articulate and forthright witnesses. Each testified with complete candor and the testimony of both Christopher and Martin is in all respects reliable and worthy of belief.

Mayor Christopher and Chairman Martin of the PUC were frank in testifying that each did what he could to solicit support for an early hearing on the question of a third nonstop carrier between San Francisco and New York. Mayor Christopher unequivocally stated that he contacted Members of Congress in this regard and that he contacted "every one else in the Bay area who had a vital interest in the airport of San Francisco, telling them of the situation that prevailed and soliciting their support." The Mayor unhesitatingly stated that he sought all the support he could get in trying to get an early hearing and decision on the nonstop matter. His testimony in this regard is in part as follows:

> "It is my policy as the Mayor of San Francisco to do all that I can to further the interest of my City. Whether it is getting a baseball team or getting a new airline route or whatever it is that we are seeking, we seek the support of our surrounding Congressmen and public officials.

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[65] Both Milias and Mrs. Benedict wrote to Senator Kuchel regarding San Francisco's interest in the nonstop case in the latter part of May, 1957, after each received a letter from Martin on the same problem.

> "In circulating this particular Letter [letter of January 30, 1959, noted above] I solicited the help and cooperation of various public officials surrounding San Francisco Bay."

Similarly, Martin, following a policy established by the PUC in 1956, set out to do everything he could to get an early hearing on the proposal for a third nonstop carrier for the San Francisco-New York market. As previously noted, copies of the PUC resolution supporting American's motion had been sent to the Senators from California, Congressmen from the San Francisco metropolitan area, outlying municipalities and other interested persons. In commenting on the wide circulation given that resolution Martin testified as follows:

> "Q Will you tell us to whom this resolution was distributed in addition to the persons named in that last paragraph?
>
> "A I can't tell you that. I wouldn't remember but I know that we sent it all over Northern California.
>
> "No, just who got it and at what times, I wouldn't know, but it received very wide distribution. I am sure that newspapers all got it. This was out campaign document. This was our policy." (Emphasis added).

The evidence is conclusive that generally the activities of Mayor Christopher and Chairman Martin of the PUC in the solicitation of support from Members of Congress, other public officials and private citizens took place prior to Board's Order E-12103, dated January 13, 1958, granting an expedited hearing. Among the exceptions to the latter finding are the Mayor's telegram of June 23, 1958, which protested the postponement of the public hearings on the nonstop question, and the Mayor's letter of January 30, 1959, to various Members of Congress expressing anxiety over the time the Examiner was taking with his Initial Decision. There is no proof in the record that either Mayor Christopher or Chairman Martin solicited anyone to contact or correspond with the

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Board after January 13, 1958, except insofar as the Mayor and the PUC urged Congressmen to attend oral argument before the Board and except insofar as the Mayor's letter of January 30, 1959, to various Members of Congress from California constituted an indirect approach to the Board through Members of Congress regarding the procedural status of the nonstop proceeding.

In reviewing the activities of American and the varied pursuits of the civic parties regarding the litigation of the nonstop proceeding, there is the problem of responsibility of American for the actions of others in connection with alleged violations of the Board's Rules. Besides the City and County of San Francisco, this reopened inquiry also covered the activities of the Chamber of Commerce of San Francisco, the City of Oakland and the Oakland Chamber of Commerce and the Port of New York Authority.

Copies of the answer of the Port of New York Authority filed with the Board on May 20, 1957, to American's motion for an expedited hearing filed on May 3, 1957, were sent to Senators Ives and Javits of New York. In a letter dated June 12, 1957, and filed with the Board on June 14, 1957, Senator Javits joined in the Port Authority's request for an early hearing on the nonstop question. After the issuance of the Examiner's Initial Decision and prior to oral argument by the Board, the Port of New York Authority sent a wire to Senator Javits, as well as to Senator Keating, advising the Senators of the imminence of oral argument before the Board and of the position of the Port Authority in support of a third nonstop carrier. Neither Senator Javits nor Senator Keating appeared at the oral argument; but, as already noted,

these two Senators sent a joint letter to the Board immediately prior to the argument endorsing the certification of a third nonstop service between New York and San Francisco. No other communications were sent by the Port Authority to any other Member of Congress. The activities of the Port of New York Authority followed its usual practice and that of civic intervenors in other new route cases in keeping Members of Congress advised of pending new route matters affecting their constituencies and the actions of the Port Authority in this regard were made without any motivation or suggestions whatsoever on the part of American.

In the case of Oakland, American asked the Oakland Chamber of Commerce to file a request with the Civil Aeronautics Board to hold an early hearing on the carrier's proposal for a third nonstop service. In a letter dated May 27, 1957, filed with the Board on June 3, 1957, the Oakland Chamber of Commerce filed a request with the Board in support of an immediate hearing on additional nonstop service between the Bay area and New York. This letter was not served on TWA or United but a copy of it was sent to Strickler of American.[66] The Manager of the Aviation Division of the Oakland Chamber of Commerce, Howard Waldorf, wrote to Congressm n Cohelan and George P. Miller on March 11, 1959, advising the Congressmen of the findings made in the Examiner's Initial Decision and of the Chamber's interest in a third nonstop route between the Bay area and New York.

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[66] As in the case of other new route proceedings, the Aviation Board of the Oakland Chamber of Commerce called in representatives of the interested carriers to make a presentation on the need for a new nonstop proceeding. Since the Aviation Board of the Oakland Chamber had invited TWA and United on the issue of a third nonstop in the Denver proceeding, only American was invited to make a presentation before the Committee with respect to American's motion of May 3, 1957. Strickler made the presentation.

Strickler's contacts with the Chamber of Commerce of Oakland prior to the activation of the nonstop proceeding were made for the purpose of seeking support for the carrier's motion for an early hearing. His appearances before the Aviation Board of the Chamber of Commerce followed the normal procedure of air carriers generally in new route proceedings in advising communities of proposals upon which a hearing is sought before the Board. In writing to the Board on May 27, 1957, requesting a hearing on American's application and in advising Congressmen Cohelen and George P. Miller of Oakland's interest in the nonstop proceeding, the Oakland Chamber acted independently of American or any of its representatives.[67]

In the case of the San Francisco Chamber of Commerce, all of the carriers serving the Bay area, including American, TWA and United were aware of the practice of the Transportation Committee of that Chamber in holding informal hearings with respect to new route applications formally moved for hearing before the Board. Indeed, each of the three carriers were represented on that Committee and its respective representatives voted on the motion as to whether or not the Chamber would support San Francisco's request for an expedited hearing. Moreover, of the three carriers only United then had a representative on the Board of Directors of the Chamber which had the power to override the Transportation Committee's recommendation that the Chamber support an early hearing on the merits in the nonstop matter. There was nothing unusual or clandestine about Strickler's contacts with the San Francisco Chamber of Commerce. As is the usual practice in the airline industry, Strickler presented American's case for an expedited hearing through the Chamber and after the proceeding was activated Strickler and Miller discussed the type of proof the Chamber of Commerce proposed to offer. Similarly, prior to the hearing on the merits of the proposals of American and Northwest, Strickler talked to Miller about prospective user witnesses for the Bay area. Strickler did accompany Miller to interview two of such prospective witnesses but this practice was discontinued after Miller's objection on the ground that some prospective witnesses might be reluctant to support the Chamber's position if a representative of an airline were involved in the request for a witness to appear at the hearing in behalf of the Chamber or the City and County of San Francisco. Strickler also made suggestions to Miller as to the kind of testimony that might be most useful by prospective user witnesses and Miller adopted some of the suggestions made. Although Miller took violent exceptions to Strickler's efforts to suggest the kind of proof to be adduced at the hearing, Strickler's practice is not uncommon in air carrier contacts with civic parties in new route cases. In the end, Strickler interviewed some of the users of air service whose testimony he thought might help the position of the Chamber; Needles and Miller interviewed others in the Bay area; and after the interviewing of respective witnesses was completed, Miller made the choice of the persons who were to testify on behalf of the Chamber of Commerce of San Francisco in the hearings on the nonstop proposals.

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[67] The City of Oakland, acting by and through its Board of Port Commissio ers, participated in the nonstop proceeding as a formal party. It filed a statement with Examiner Bryan in lieu of a brief on the merits of the issues and it endorsed and supported the Initial Decision of the Examiner served on March 9, 1959, in a later statement filed with the Board.

As already shown, the San Francisco Chamber of Commerce by letter to the Board dated May 24, 1957, supported the efforts of the PUC of San Francisco to obtain an expedited hearing on American's nonstop proposal. On the same date, E. D. Maloney, President of the Chamber, wrote letters to Senators Knowland and Kuchel, and Congressmen Mailliard, Shelley, Younger, Allen, Scudder, Baldwin and George P. Miller informing these Members of Congress that the Chamber was supporting the resolution of the Board of Supervisors and the PUC of the City and County of San Francisco and asked the cooperation of each of the Members of Congress just noted. Attached to the letter to the foregoing Members of Congress was a copy of the May 24, 1957, letter to the Civil Aeronautics Board. As a matter of fact, a copy of the letter of May 24, 1957, to the Board was also sent to all members of the Transportation Committee of the San Francisco Chamber of Commerce. Since American, TWA and United each had representatives on that committee, the three carriers were not unaware of the Chamber's efforts to support the City and County of San Francisco in obtaining an expedited hearing on the nonstop question.

Although the Chamber of Commerce of San Francisco received advice, information and suggestions from representatives of American, the Chamber's practice of sending communications to the Board and to Members of Congress in support of an expedited hearing represented an independent decision on the part of the Chamber to so proceed. After the activation of the nonstop proceeding on January 13, 1958, Miller of the San Francisco Chamber of Commerce continued to consult with American through Strickler regarding the type of proof to be adduced in the civic portion of the hearings; but Miller exercised his independent judgment on the final composition of the Chamber's exhibits and selection of witnesses called to support the Chamber's or the City's position.

In view of the prolonged contacts between American and the officials of San Francisco, the very close collaboration between these two parties through a considerable portion of the nonstop proceeding, and the meshing of the early efforts of the carrier and the City to obtain favorable action on the carrier's request for an expedited hearing on the nonstop issue, the alleged responsibility of American for the actions of the City and County of San Francisco presents a more difficult problem of fact. The proof necessary to establish such responsibility is the evidence adduced on this problem during the reopened hearings and not the evidence which might be required but remains unadduced or nonexistent as a matter of required demonstration of an improper relationship between the carrier and the City and County of San Francisco. Since the carrier must be shown to have been actually responsible for the actions of San Francisco, the mere fact that representatives of the carrier might have hoped or wished that San Francisco would take a course of conduct which later turned out to be injudicious or improper is not by itself such evidence as the law requires as the basis for legal inference for blame on the part of the carrier. In short, a demonstration of responsibility on the part of American must clearly show the carrier as the actual moving cause or power which impelled San Francisco to the alleged objective of improperly pressuring or attempting to exert improper pressure on the Board.

Of primary significance to American's relationship with San Francisco during the period May 3, 1957, when American's request for an expedited hearing was filed, to June 26, 1957, when that request was denied, and from the latter date to January 13, 1958, when the nonstop proceeding was activated, is the vital and uncontroverted fact that during this entire period all that San Francisco was seeking from the Board was a hearing. Martin's testimony clearly states San Francisco's policy in this regard:

> "I have always made it clear to Mr. Shipley and everybody else that we didn't care which airline got the third nonstop route as long as we got adequate service."

There is substantial evidence to show that San Francisco independently charted its own course of action from the very beginning of the events encompassed by this reopened inquiry. While the officials of San Francisco had been discussing and focusing on the need for a new nonstop proceeding soon after the Board's denial of such proposed service in the Denver proceeding, the City flatly rejected American's request that it file a motion to activate a new nonstop proceeding in the early months of 1957. Following the filing of American's motion for an early hearing on May 3, 1957, the officials of the City and representatives of the carrier met frequently to discuss strategy for favorable action on the carrier's request. San Francisco concedes that representatives of the carrier aided and advised San Francisco whenever called upon in the preparation of the numerous communications and pleadings which thereafter flowed from the offices of the Mayor and the PUC on the limited question of the carrier's request for an expedited hearing. However, the record is clear that the representatives of the carrier, particularly Shipley and Strickler, served solely in an advisory capacity and as helpers and not as policy makers or drafters of communications and pleadings.[68] It is true that American employees circulated a draft form of resolution in support of an expedited hearing on the nonstop question to the outlying chambers or trade associations in the Bay area; but this activity was not a joint venture on the part of the carrier and the City and County of San Francisco. Although information regarding the outlying chambers of commerce was no doubt exchanged between the carrier and San Francisco, the record holds the carrier wholly accountable for the circulation of the form or draft resolution. The City circulated a draft resolution of its own to the outlying municipalities in the Bay area.

It is also true that Strickler made numerous contacts with the officials of San Francisco prior to the filing of American's motion on May 3, 1957, and that he supplied those officials various types of economic data relating to the alleged need of a third nonstop carrier between San Francisco and New York.[69] But rightly or wrongly, the practice of air carriers' contacts and the provision of economic data relating to proposed new route applications by their representatives to civic officials and organizations is commonplace in the airline industry. Strickler was aware from early 1957 that the final decision as to the contents of communications and pleadings of San Francisco rested primarily with the City Attorney's office and other City officials.

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[68] Thus, Martin further testified as follows: "I informed Mr. Strickler of the many actions that we were taking. I discussed what actions he was taking . . . we considered up to a point that we could use American Airlines here, use their help, their staff."

[69] And, as previously noted herein, the carrier's Public Relations Office in San Francisco supplied similar information to the daily press of the Bay area.

Strickler was used by the City as a source of needed traffic information and related data, as a "secretary" and as a valuable "leg man" to make up for the City's lack of staff in organizing its campaign to enlist support for a new hearing on the nonstop issue. The fact that American and the City sought the same objective of an expedited hearing, of course, was a boon to the City's efforts.

It is not uncommon in the law for persons or prospective parties on the same side of a cause awaiting trial to work together on the matter. Litigants with common interests traditionally pool their resources whether it is a case before a regulatory tribunal or a case in the courts. American has in the past provided other cities with assistance similar to that provided San Francisco in this case. San Francisco has in other cases accepted similar assistance from other carriers. Indeed, the cooperation between the Bureau of Enforcement of the Board and United and TWA without notice to either American or San Francisco in this reopened inquiry is a familiar example of several parties to a case exchanging information and joining in a single presentation at the trial.

Admittedly the City and County of San Francisco sought aid of the United States Senators and Congressmen in furthering the objectives of an early hearing on the nonstop question. But San Francisco did not rely upon American to obtain Congressional support in any way during the nonstop proceeding.

It had experienced politicians in the Mayor and the Chairman of the PUC and influential private citizens it could rely upon and did rely upon in contacting Members of Congress from California. The City was handling its own case under the overall policy direction of the PUC and Mayor Christopher and under the trial direction of Dion Holm, City Attorney, and Frank J. Needles, Deputy City Attorney. Each of the latter officials have had long experience in the institution and conduct of transportation proceedings before the Board and other regulatory tribunals. Although American participated in discussions regarding Congressional and other official support for the City's efforts to obtain an early hearing on the nonstop question, San Francisco made its own decisions and contacts for such support. The following straightforward testimony of Martin accurately portrays the City's attitude regarding the assistance of air carriers in this respect:

> Q. Did you discuss this help of your Congressmen with anyone from American Airlines?
>
> "A. Oh, sure. I am sure that Mr. Strickler and I discussed it. He took over for American Airlines after we got into this thing or maybe when we were getting into it, but I don't remember.
>
> "He was actually useful to us as far as I was concerned. We have got a terribly small staff and we are trying to run and build an airport. We haven't got many leg men and we made it a practice to accept the help of all the airlines whenever we were walking down the same side of the street.
>
> "They could do the leg work because we have no staff to even get the information."

Q. Limiting my question now to specifically the Congressional support, how did Mr. Strickler help you, if in any way?

"A. *I don't think that Mr. Strickler helped us in the Congressional support*. *I think that the City's interest in the thing is what got the Congressional support*. *I am certain that I told him who we were going to contact*." (Emphasis added).

Q. You told Mr. Strickler who you were going to contact?

"A. We discussed this with the Mayor. I think all the -- well, I think that practically all, if not all of the contacts with Congressmen and Senators, were made by City officials.

"Now, American undoubtedly was making their own but *we weren't relying on American*. We didn't know what they were going to say and *we had our own story to tell and we wanted to tell it*." (Emphasis added).

Strickler did not contact Governors Brown or Knight or Lieutendant Governor Powers of California, or any Members of the Legislature between January 13, 1958, and September 2, 1959. During this same period, with the exception of seeing Congressman Baldwin on one occasion, attending Congressman Sisk's lunche in Washington and furnishing Congressman Shelley with materials appearing in the Bay area press, Strickler had no contacts with any of the California Congressional delegation. Strickler met with Congressman Baldwin in Washington i the spring of 1959 prior to oral argument before the Board and Strickler then discussed the possible appearance of the Congressman at oral argument at the suggestion of a private citizen of the Bay area. Taylor did not contact any California State officials, members of any California Chambers of Commerce, or any City officials of the State of California. He never met with Donald Cleary the Downtown Association or the San Francisco Labor Council regarding the non-stop proceeding.

Strickler was with Taylor at Congressman Sisk's luncheon in April 1959 at the invitation of Congressman Sisk. As already noted, the luncheon followed the issuance of the Examiner's Initial Decision and the discussion on that occasion concerned itself with the question of California Congressmen participating at oral argument or submitting a statement in lieu thereof. But San Francisco already had communicated with the Congressmen, requesting them to appear at oral argument. Strickler and Taylor were invited to the Sisk luncheon to give the Congressmen some back ground on the nonstop proceeding and to acquaint or reacquaint the various Congressmen present with the nature of an oral argument before the Board.

It has already been found that Taylor spoke to various Congressmen in Washington both with respect to the filing of American's motion for an early hearing and then later with respect to the possible attendance of various Members of Congress at oral argument. Again, rightly or wrongly, such Congressional contacts were a part of Taylor's duties. Shipley also talked to Senators Knowland and Kuchel and Congressmen Shelley, Younger, Allen, Mailliard and others. As in the case of Strickler and Taylor, Shipley informed various Congressmen on the progress of the nonstop proceeding and made suggestions to the Congressmen if requested to do so. The fact of airlines contacting and informing Congressmen about new route proceedings, as well as regarding numerous legislative matters affecting the industry, is a common and well-known practice in Washington. The major trunkline carriers each has one or more men that act as their representatives on Capitol Hill for those very purposes.

The record leaves no doubt that American pursued its own activities on Capitol Hill regarding the nonstop proceeding, both before and after its activation. Moreover, the evidence is conclusive that San Francisco on its own and through its own devices sought the support of California's Congressional delegation prior to the Board's grant of an expedited hearing and for the purposes of oral argument before the Board. The evidence is likewise plain that while representatives of American aided and advised San Francisco whenever called upon in the preparation of the City's communications and pleadings, such communications and pleadings were not incited or propelled by the representatives of the carrier working with San Francisco on the nonstop matter. However, it must here be made clear that the absence of responsibility on the part of American for the actions of San Francisco does not affect the accountability of each individually to the provisions of the Board's Rules.

Looking at the original nonstop proceeding as a whole, there is really nothing exceptional about the communications to the Board contained in the public correspondence file in Dockets 5903 and 9214. Communications such as these -- from Congressmen, other public officials, civic groups and private citizens -- are common with the Civil Aeronautics Board and other regulatory proceedings. Moreover, the communications to the Board in the nonstop case did not set forth meaningful facts or arguments not already brought to the Board's attention in the formal papers of American and San Francisco, but were the sort of expressions of interest and support that normally come from Congressmen, other public officials, civic groups and private citizens in new route cases.

As already found, the public correspondence file in Dockets 5903 and 9214 contain a total of 134 communications to the Board. The total number of communications to the Board in the public correspondence files of several other route proceedings of recent years are as follows: Great Lakes-Southeast Service Case, Docket 2396, 507 communications; Dallas to the West Service Case, Docket 7596, 195 communications; and Service to Phoenix Case, Docket 6247, 122 communications. As of November 1, 1960, prior to the issuance of the Board's decision in the Southern Transcontinental Service Case, Docket 7984, there were 191 communications to the Board in the public correspondence file of that case.

The contents of communications to the Board in the nonstop proceeding are typical of the contents of communications to the Board in these other proceedings. Many of the communications were formal, stereotyped resolutions by civic bodies; others were communications from Members of Congress urging an early hearing, an early decision and in a few cases direct support of American's proposal; and still others were letters from trade associations or private individuals expressing interest of one kind or another in the nonstop question. Many of the communications reiterated facts or arguments contained in the formal papers of American and San Francisco, but none set forth significant matters not already contained in those papers.

Congressmen are very frequently in touch with the Board and with other Federal agencies to inquire as to the progress of a proceeding pending before them. In a statement recently made before a House Committee, the Board said that "status and procedural inquiries are in no wise improper, but rather represent the normal and expected course of action."70/

It is not uncommon for Congressmen and other public officials to communicate with the Board requesting that hearings be held on specific applications or issues. This practice is well illustrated by at least four major Board proceedings.

Thus, in the New York-Florida Case, Docket 5192, which, among other things, involved an application of Northeast Airlines for New York-Florida authority, the public correspondence file contains a total of 32 communications to the Board dated between March 15 and August 16, 1954, on which latter date the Board issued a notice that a pre-trial conference would be held in a case styled as the "New York-Florida Service Case, Docket 3051." These communications were from Congressmen, from Governors of Massachusetts and Maine, and, in a few instances, from corporations and private citizens. In almost all cases the communications requested an expedited hearing on Northeast's application for New York-Florida authority.

70/ Hearings on Independent Regulatory Agencies Legislation before the House Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. 278-279 (1960) See also statement of Franklin Stone, General Counsel of the Civil Aeronautics Board, in Hearings on Major Administrative problems before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. 17-18 (1959). See, also, in connection with the former hearings, testimony of Frederick W. Ford, Chairman of the Federal Communications Commission, at p. 157 to the effect that "We ... get just dozens and dozens of requests for status of proceedings from Members of Congress and others

On May 13, 1954, while testifying before the Subcommittee on Appropriations of the Senate Commerce Committee, the Board Chairman was asked by Senator Margaret Chase Smith about the Board's plans for hearing Northeast's application. The Chairman answered that the Board hoped it would be able to initiate such a proceeding in the fall of 1954.[71/] During the period prior to August 14, 1954, when the Board activated the New York-Florida Case, there was widespread circulation by Northeast to its stockholders and to New England and Florida Congressmen of pamphlets entitled "First in New England Skies" and "A New Salesman for Florida," reciting the reasons why a third New York-Florida carrier was needed.[72/] In addition, among the above communications in the public correspondence file of Docket 5192 is a letter dated April 2, 1954, in which Senator Saltonstall referred to conversations between himself and G.E. Gardner, President of Northeast, concerning the carrier's application for New York-Florida authority.

On July 8, 1954, some five weeks before the New York-Florida Case was set for hearing, Gardner sent the Board Chairman a copy of the pamphlet entitled "A New Salesman for Florida" and a covering letter which outlined the distribution of the pamphlet.[73/] On July 15, 1954, the Chairman wrote

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[71/] Hearings on H.R. 8067 before the Subcommittee on Appropriations of the Senate Commerce Committee, 83rd Cong. 2d Sess. 1995 (1955).

[72/] See transcript of hearings in the New York-Florida Case, Docket 3051, pp. 2028-2031.

[73/] The pamphlet received the widest kind of circulation and among its off-the-record recipients were not only each Member of the Board but also members of the Board's staff. Ibid, p. 2029. Nothing quite so brazen and so scandalous had taken place in the proceeding which is the subject of this reopened inquiry

Gardner that he appreciated Gardner's "thoughtfulness in making this pamphlet available to us."[74]

There next follow findings with respect to Congressional activities urging the activation of the St. Louis-Southeast Case, Docket 7735. On January 17, 1956, Senator Symington called for a Congressional investigation of the "incredibly poor airline service" to St. Louis (102 Cong. Rec. 641). On February 15, 1956, the Aviation Subcommittee of the Senate Commerce Committee began hearings on the St. Louis air service question.[75] At the time the hearings began, there were applications pending before the Board for St. Louis-Southeast authority of Braniff Airways, TWA, and the City of St. Louis. The Board was represented at the Congressional hearings and Senator Smathers announced that the Subcommittee would hear testimony from the Board. The hearings were recessed on the same day, subject to call from the Chair. Two weeks later, on March 2, 1956, the Board issued Order E-10063, directing an expedited hearing on the question of additional St. Louis-Southeast service.

A third illustration of Congressional prodding of the Board involves the General Passenger Fare Investigation, Docket 8008. On April 23, 1953, by Order E-7376, the Board granted petitions of the air carrier parties to dismiss the pending General Passenger Fare Investigation. Thereafter, the question of the general level of airline fares and the need of a Board investigation of those fares received a great deal of Congressional attention.[76] On May 10, 1956, the Board issued Order E-10279 instituting the *General Passenger Fare Investigation*.

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[74] By contrast, when Northeast in September 1954 -- approximately a month after the notice of prehearing conference -- published newspaper advertisements asking the public to support its application, the Board Chairman wrote Gardner complaining that in his view the advertisements violated the Board's Principles of Practice (See Chairman's letter of September 24, 1954, in the correspondence file of the New York-Florida Case, Docket 3051).

[75] Hearings on Air Service to St. Louis before the Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 84th Cong.2d Sess. (1956).

The Board traditionally has received statements by public officials in lieu of appearance by these officials at oral argument. During the course of his testimony before the Harris Subcommittee on Legislative Oversight in 1957, Chairman Durfee of the Board stated that the Board gives a Congressman the option of "appearing before the Board and participating in the oral argument . . . (or of writing) a letter addressed to the Board stating his position as to the interest of his constituency in a particular case." The Chairman pointed out that the Board receives such letters and places them in the appropriate correspondence file.[77]

Nor do Members of Congress always wait for the formality of oral argument before the Board in writing their views to the Board on the merits of pending applications. Thus, the correspondence docket in the *New York-Mexico City Nonstop Service Case*, Docket 2909, shows communications from some Members of Congress expressing a preference for the successful applicant in that case at various times prior to oral argument held on May 29, 1957. Other Members of Congress communicated with the Board on the critical issue of air carrier choice in that proceeding after the conclusion of oral argument. Still others of the remaining communications in the correspondence file of Docket 2909 speak either for or against the successful applicant in that case. Moreover, two Members of the United States Senate took the extraordinary measure of denouncing on the floor of the Senate on June 6, 1957, approximately a week after oral argument and six weeks before Board decision, the Report of the Examiner in the New York-Mexico City Nonstop proceeding. The pages of the Congressional Record condemning the Report (103 Cong. Rec. 7564-7570) were forwarded to the Board by one of the Senators under a transmittal letter dated June 10, 1957.[78/] Nothing quite so startling and so drastic had taken place in the nonstop proceeding which is the subject of this reopened inquiry.

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[76] See, for example, Hearings on Monopoly Problems in Regulated Industries before the Anti-Trust Subcommittee of the House Committee on the Judiciary, 84th Cong. 2d Sess. I, 3 *et seq*. (1956). During the course of the hearings, Congressman Celler, referring to the current level of airline earnings, asked Chairman Ross Rizley and Member Joseph P. Adams of the Board if they did not agree with him that certain "factors certainly indicate the need for that general inquiry that we spoke about as to the level of fares." Chairman Rizley agreed that the matter required "a fresh look." (Hearings, III, 153).

[77] Hearings on "Right of Access to C.A.B. Files" before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 85th Cong. 1st Sess. 53.

The Board has openly encouraged Members of Congress to express themselves on Board matters of interest to the Congressmens' constituents. Thus, Chairman Durfee remarked during the oral argument in the Northeastern States Area Investigation, Docket 6463, that "we are always pleased to have

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[78/] Since the New York-Mexico City Nonstop proceeding involved foreign air transportation, the Board's decision in the matter was subject to the approval of the President under section 801 of the Act. The Board's decision in the matter was rendered on July 19, 1957, by Order E-11689 and the President approved that decision on August 14, 1957. The proceeding under Docket 2909 also involved serious charges challenging the fitness and qualification of each of the two competing applicants. The Board and the President approved the Examiner's findings with respect to those charges; but, presumably because they involved foreign affairs considerations, these findings have never been made public.

the advice and consultation of the Members of Congress of the particular districts that are affected."[79] Member Hector's concurring and dissenting opinion in the Great Lakes-Southeast Service Case, Docket 2396, Order E-13835, May 7, 1959, at page 5 states in part as follows: "Members of Congress have a detailed knowledge of the area they represent and its transportation needs . . . it is only natural that their district or state should wish them to appear before the Board on their behalf when air service to the area is at issue." Indeed, during the course of April 29, 1959, oral argument in the New York-San Francisco Nonstop proceeding, Chairman Durfee stated that the Board had "always welcomed" Congressional representations as "being representative, truly representative of the expressed will of the people from the constituencies they represent."[80]

This reopened inquiry has, of course, exposed the many and varied activities which inspired and motivated the sending of communications to the Board in the several stages of the nonstop proceeding. In this respect, the investigation ordered by the Court has broken new ground in revealing the numerous extra pre-record and pro-record maneuverings and pursuits of a large regulated air carrier and a powerful civic party to an adjudicatory proceeding before the Board and indisclosing the difficulties which beset regulatory agencies in their relations with the Congress. Whether these activities were violations of the Board's Rules will be presently analyzed.

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[79] Transcript of oral argument p. 167.

[80] Transcript of oral argument in Docket 9214, pp. 25-26. See also remarks of Chairman Durfee at p 34 of Hearings on Major Administrative Problems before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 86th Cong. 1st Sess. (1959), where Durfee spoke in part as follows: "I have at times stated that the Board was pleased to hear from these representatives."

Before proceeding with the analysis regarding the alleged violations of the Board's Rules and the ultimate findings to be made with respect to those allegations, it is found as a matter of evidential fact that at no point either before or after the activation of the New York-San Francisco Nonstop proceeding was there any bribery or corruption or venality on the part of any of the parties to this case or on the part of any staff member, Examiner or Board Member. Similarly, the record contains no evidence of any clandestine or improper personal meetings or personal contacts between any representative of any of the formal parties to the proceeding and any staff member, Examiner or Board Member. Moreover, the record contains no evidence of conscious wrongdoing of any kind on the part of any third person not a party to the nonstop matter, including Members of Congress and other government officials.

Statement of Ultimate Facts

Whatever may be the Board's decision and recommendation to the Court with respect to the alleged violations of the Board's Rules leveled against American and the City and County of San Francisco in the litigation of the nonstop matter, this reopened inquiry has failed to adduce sufficient evidence to show that the Port of New York Authority, the Oakland Chamber of Commerce[81] and the San Francisco Chamber of Commerce have either individually or in concert with American violated the Board's Rules of Practice in Economic Proceedings or the Principles of Practice of the Civil Aeronautics Board. The activities and the communications of each of the latter parties were but few and sporadic in nature; their communications to the Board and to Members of Congress either observed the Board's Rules or were merely commonplace communications such as are often made to the Board or to Members of Congress manifesting a civic interest in a new route application; and to the extent activities and communications of each of the latter parties can be called ex parte or extra record, such activities or communications were entirely lacking in any intent to violate the Board's Rules, much less to deny a fair hearing to TWA, United and Northwest. As a matter of fact, neither the Bureau of Enforcement nor the complaining carriers, TWA or United, take the position in this reopened inquiry that any party except American and San Francisco has violated the Board's Rules.

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[81] The filings by the Port of Oakland with the Board in the nonstop proceeding were made in accordance with the Board's Rules of Practice. The Port of Oakland did not engage in any ex parte activities during the course of the nonstop proceeding.

In the case of American and San Francisco, the alleged violation of the Board's rules will be disposed of by ultimate findings in the context of both the Board's Rules of Practice and its Principles of Practice. The pertinent provisions of the Board's Rules are attached hereto as Appendix B. The Board's Rules of Practice in Economic Proceedings are known as Part 302 of its Procedural Regulations (14 C.F.R. 302, et seq.) and the Board's Principles of Practice are known as Part 300 of the Board's Procedural Regulations (14 C.F.R. 300 et seq.). A proper guide to the interpretation to the Board's Principles of Practice are the various accepted professional standards of conduct involved in a party's participation in an adjudicatory proceeding, as gauged and measured by the Canons of Professional Ethics of the American Bar Association.

On March 18, 1960, the Board issued a Notice of Proposed Rule Making, Docket 11221, proposing various amendments to Part 302, the Board's Rules of Practice in Economic Proceedings, and Part 300, the Board's Principles of Practice. This rule-making proceeding was instituted as a direct result of the Board's opinion and order in the New York-San Francisco Nonstop Service Case, Docket 9214, which was adopted November 19, 1959, and which denied or dismissed portions of certain petitions for reconsideration of TWA and United in that proceeding urging that the certification of American for the third nonstop service between New York and San Francisco be set aside on the ground that American and certain cities in that proceeding engaged in ex parte activities in violation of the Board's Rules. In that opinion the Board stated that in view of the various problems of interpretation and application of the Board's Rules which became apparent in the nonstop proceeding, the Board would undertake a prompt rule-making reexamination looking toward the modification and clarification of its regulations.

On December 1, 1960, the Board adopted Amendment No. 23 to Part 302 of the Rules of Practice, now known as Regulation PR-44, which made certain amendments to Part 302.14 of the Rules of Practice, commonly known as Rule 14. On the same day the Board adopted Amendment No. 1 to Part 300, the Board's Principles of Practice, now known as Regulation PR-43, which made extensive revisions in the Board's Principles of Practice. Both Regulation Nos. PR-44 and PR-43 became effective on December 6, 1960. Moreover, on December 1, 1960, the Board issued a further Notice of Proposed Rule Making in Docket 11221, identified as proposal PDR-4, which contemplates further revisions in Rule 14 of the Rules of Practice.

Rules of Practice. - As in the case of other regulatory agencies with similar functions, that part of the Board's Procedural Regulations governing the conduct of adjudicatory proceedings is a complex compendium of frequently amended and sometimes confusing rules. It is a brave practitioner before the Board who will say with real assurance that he really knows what each rule currently means. For stronger reasons, the lay officials of an air carrier, the public officers of a civic party and various representatives of the State and Federal governments, including Governors and Members of Congress, are also likely to have difficulties with the interpretation and application of specific rules set forth in the Board's Rules of Practice. Such difficulties are compounded when the Board's normal practice has departed from the specific language of a particular rule -- as indeed such practice has in permitting Congressmen to participate at oral argument under the last sentence of Rule 14 as set forth in Appendix B attached hereto.

Sections 401(c) and 401(g) of the Federal Aviation Act specifically grant any interested person an unqualified right to file with the Board a "protest" or "memoranda" in opposition to or in support of any application for the issuance of a certificate or an amendment of a certificate of public convenience and necessity. Insofar as this right relates to the filing of pre-case communications -- i.e. communications prior to the activation of an economic proceeding -- the Board has never purported to prescribe or limit in any way that right in its procedural rules and principles of practice.

There is no specific indication in the Act of the status of such "protest" or "memoranda" or what consideration or disposal should be made of them by the Board. The legislative history of the Act is of no help. Definitions offer but little clarification.[82] Turning to the principles of statutory interpretation, it is an elementary rule that the statute should be construed so as to give meaning and effect to every part of it.[83] To construe the "protest" and "memoranda" sentence of sections 401(c) and (g) simply as an authorization to interested persons to correspond with the Board would appear to constitute deprival of the effect of the sentence, because it has long been conceded that any person may correspond with a government agency without Congressional authorization. However, there seem to be two possible interpretations which can give this provision force and effect. One is that the "protest" or "memoranda" were intended to constitute evidence; the other that they were intended to be statements to the Board on the merits of pending procedures or briefs to the Board on the merits of pending applications.[84]

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[82] In Webster's New International Dictionary (2d Ed.) a protest is defined as "A solemn declaration of disapproval of, or lack of full consent in complying with, a law, a demand, etc." and a memorandum is defined as "An instrument drawn up in a brief and compendious form" or "an informal communication."

The bulk of the material that has been coming to the Board in certificate cases over the years under section 401(c) has consisted of resolutions of civic organizations and letters from individuals, public officials, or business firms along proposed airline routes stating their desires for the service, their prospective uses for it and their preferences for one applicant or another. Such declarations do not come within any of the conventional exceptions to the hearsay rule and could not be received as evidence in certificate proceedings in the absence of agreement or stipulation by all parties. The alternative interpretation is that the sentence in question of sections 401(c) and (g) is an authorization for interested persons to submit statements to the Board on the merits of pending pre-case procedures, or briefs to the Board on the merits of a pending proposal after hearing.

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[83] Sutherland "Statutes and Statutory Construction" 2d Ed. (1904), section 380, with numerous authorities therein cited.

[84] It might occur that a third way of giving the sentence in question some effect would be to consider the protests or memoranda as pleadings in the form of petitions for intervention, but this could not be justified by a fair use of the language in the text nor in the light of the adequate consideration given to intervention by section 1009 of the Act.

Now, no party to this reopened inquiry has taken the trouble to research the legislative history of Rule 14 to see whether that Rule was intended to implement the "protest" and "memoranda" sentences of sections 401(c) and (g), either by way of preamble or by the specific terms of the Rule. Prior to December 6, 1960, which is the effective date of the most recent revision of Rule 14, this Rule provided, as it still does, that non-parties may present relevant evidence at hearing; cross-examine witnesses with the consent of the person presiding at the hearing; and present to both the Examiner and the Board a written statement on the issues involved in the proceeding. The Rule obviously intended that such latter statements be filed and served as a formal paper. Finally, the last sentence of Rule 14 provided that a representative of any department, agency or branch of the Federal government or of any State government may appear and present oral argument before the Board. The Board has consistently taken the position that under the latter provision Members of Congress could appear and participate in oral argument, whether in person or through a personal representative or by means of writing a statement or letter.[85]

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[85] The Board has taken the position described above in spite of the fact that it is doubtful whether a Congressman presenting the views of his constituents to the Board is a representative of Congress or any other branch of the Federal government. But, as hereinafter shown, the Board has recently proposed a new Rule limiting oral argument to parties who have participated in the proceedings before the Examiner.

The predecessor section of section 302.14 which was in effect at all times relevant to the litigation of the nonstop case was section 302.6 of the 1949 revision of the Rules of Practice in Economic Proceedings. The latter Rule became effective on July 1, 1949. The 1949 version of the Rule permitted any person, including any State or other public body, to appear at a hearing and present relevant evidence. It further provided that such persons could suggest questions to be propounded by the government's counsel to witnesses called by other persons and, with the consent of the officer presiding at the hearing, cross-examine such witnesses directly.

Subsequently, the Port of New York Authority requested the Board to amend this provision to authorize non-parties to present a written statement on the issues in lieu of formal intervention. At that time, the Rules did not prohibit the filing of such statements and in route cases the Act specifically authorized them. However, the Board believed it desirable to extend this statutory privilege to all formal economic proceedings and to clarify the rules. Therefore, it adopted Amendment No. 2 to Part 302, effective August 1, 1952, which added the following language: "In addition, such persons may present to both the Examiner and the Board an oral or written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board." (Emphasis supplied). This amendment inadvertently authorized all non-parties to present oral argument to the Board, and it did not reflect the Board's policy of limiting oral argument to formal parties and to Congressmen.

In order to remedy this error the Board adopted Amendment No. 3 to Part 302, effective May 1, 1953, which limited the participation of non-parties in oral arguments to representatives of any department or agency of the Federal government or of any State government, including a State aviation commission. As already indicated, the latter provision has been consistently interpreted by the Board as permitting Congressmen to participate in oral argument.

In the various revisions of the Rules of Practice through the years since the enactment of the Civil Aeronautics Act of 1938, the "protest" and "memoranda" provisions of section 401 of the Act are only mentioned once. This one reference is made in the preamble to Amendment No. 2 to Part 302 of the Procedural Regulations, which amendment was enacted at the instance of the New York Port Authority and became effective on August 1, 1952.[86] The preamble reads as follows:

> "The present section 302.14 of the Procedural Regulations provides for participation in hearings in economic proceedings by persons not parties by appearance at a hearing and the presentation of evidence relevant to the issues. However, the section does not now contain any provision which specifically permits persons not parties to file with the Board a written statement of their position. The Port of New York Authority has requested the Board to include such a provision in section 302.14. It is asserted that the inclusion of such a revision would relieve many parties from the burdens of formal intervention and could also result in a saving of time to the Board. Upon consideration of the application, we concur in these views. Although the Act now gives a statutory right to file a protest or memorandum of opposition in a proceeding under section 401, this right does not extend to all Board proceedings. Consequently, some procedural regulation is necessary to make clear that a written statement in lieu of intervention may be filed in any Board economic proceeding."

The foregoing amendment of Rule 14 allowed persons or organizations wishing to avoid the burdens of formal interventions to file a written statement on the

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86/ Regulations Serial Number PR-16.

merits of a proposal before the Examiner and the Board after hearings in all economic proceedings except economic enforcement cases. But the Board made no finding that Amendment No. 2 of August 1, 1952, was intended as an implementation of the "protest" and "memoranda" provisions of sections 401(c) and (g) of the Act. On the contrary, the language of the preamble quoted above makes clear that the aforesaid Amendment No. 2 to Rule 14 was an extension of the statutory filing rights under sections 401(c) and (g) and not an implementation or clarification thereof.

The provision as to written statements could not be construed to govern the "protest or memorandum of opposition to or in support of the issuance of a certificate" language provided for in the statute. The statutory provision is a special one dealing with certificate applications -- not a general provision for all economic proceedings as is Rule 14 -- and, especially when read in context, obviously contemplates a right to file protests or supports at any time, including the time prior to the setting of the case for hearing -- not, as in the case of the statement contemplated by Rule 14, a formal brief based on a record made up at the evidentiary hearing.

As a result, the Board's regulations as revised in 1952 left a big hole or a no man's land whereby numerous pre-case communications continued to flood the Board offices in every major new route proceeding on the subjects of severance, activation and expedition of new route applications without control by any specific rule under which they were to be filed. If these communications have had any sanction in law or regulation at all, they must have been considered filings under sections 401(c) and (g) as communications on the merits of procedural matters pending before the Board.

The view that such pre-case communications have been properly receivable under the aforesaid sections 401(c) and (g) is confirmed by the fact that the Board acted on December 1, 1960, to plug, at least in part, the hole or no man's land of uncertainty which existed prior to that date regarding the inauguration, activation and expedition of proceedings. The Board then added, effective December 6, 1960, a new section to Rule 14 providing specific machinery for the filing of "requests for expedition" of proceedings and answers in support of, or opposition to such requests. The new section requires service of such requests and answers "upon all parties to the case" as provided by Rule 8 of the Rules of Practice. The Board took this action as a direct result of the situation revealed to it in the nonstop proceeding under Docket 9214. It made no finding that this new addition to Rule 14 in any way implements the "protest" and "memoranda" sentence of sections 401(c) and (g) of the Act.

Perhaps the Board did not specifically intend to implement the "protest" and "memoranda" sentence of sections 401(c) and (g) of the Act with its recent revision of Rule 14. But if the Board is taking the position that "protest" and "memoranda" sentence of sections 401(c) and (g) was intended to mean only briefs after hearings on the merits, the least the Board can do is to say so. The lack of a clear implementation of that sentence of sections 401(c) and (g) is incomprehensible.

Even the clarifying amendment of December 6, 1960, which established a regulation for the filing of "requests for expedition" of proceedings and answers thereto, has not taken the Board out of the woods in the matter of clear and concise regulations governing the activation or expedition of new route proceedings. For example, the December 6th revision of Rule 14 requires that motions for expedition of a proceeding and answers thereto shall be served "upon all parties to the case." At the time that San Francisco filed its numerous communications with the Board urging severance and an expedited hearing on American's nonstop proposal, there was no "proceeding" and there were no "parties" except the applicant, American. The problem of service of "requests for expedition" could be clarified to include service upon all carriers serving a city or serving the cities for which new service is proposed as well as the carrier whose application is sought to be expedited by an early hearing and the cities for which new or additional service is requested.

Does the recent addition of the "requests for expedition" section of Rule 14 mean that prior to the addition of this amendment cities and chambers of commerce were barred from informal contact with the Board over the years with respect to their air service problems? They obviously should not have been and were not so barred. For example, before the activation of the Southern Transcontinental Service Case, Docket 7984, the cities of Orlando and Houston had been in dire need of improved southern transcontinental air routings and they made their needs known in informal conferences with the Board in November 1957. For years other cities and chambers of commerce have simply written or talked to the Board with respect to their air service problems. Yet, before the recent amendment of Rule 14 restricting the manner in which requests for activation or expedition of proceedings are to be filed, there was no Board Rule covering such requests unless the "protest" and "memoranda" provisions of sections 401(c) and (g) of the Act contemplate such filings.

As already shown, the latter provisions of the statute have never been implemented by specific Board rule.

As just noted, the Board on December 1, 1960, issued a further Notice of Proposed Rule Making which would again amend Rule 14. This latter proposed Rule would delete the third and last sentence of Rule 14 as it appears in Appendix B attached hereto and substitute in lieu thereof the following text:

> "Such persons may also present to the Examiner a written statement on the issues involved in the proceeding. Unless otherwise directed by the Examiner, such written statement shall be filed and served on all parties prior to the close of the hearing."

The above proposed Rule would therefore leave the requirements of service of statements on the issues involved in a proceeding, in part, in the hands of the Examiner. As in the case of the Rule 14 which was in effect at the time of the litigation of the nonstop proceeding, the proposed revised Rule contemplates a statement based on the record made up at the evidentiary stage of the case. Moreover, the proposed further provision of Rule 14 contemplates that non-parties can participate in a proceeding only by presenting at the hearing evidence and memoranda relevant to the issues in a case. This proposed change would eliminate the oral arguments now presented to the Board by Members of Congress, spokesmen for the Federal agencies and the State aviation commissions unless the latter agencies had been granted formal leave to intervene. This proposed amendment would also limit the right now enjoyed by non-parties to present written memoranda expressing their views to the Examiner or to the Board by requiring that such statements be presented prior to the closing of the hearing in order to afford other parties an opportunity to cross-examine them and rebut the evidence and contentions contained in such memoranda.

The above proposed change in Rule 14 is a salutory one. If eventually adopted and thereafter properly enforced, this latest proposed amendment should eliminate much of the confusion now existing as to the propriety of communications to the Board and its Examiners during the course of an economic proceeding.

In spite of the already effective change in Rule 14 regarding the filing of documents relating to the activation and expedition of a new route proceeding and the further proposed change limiting the submission of statements or memoranda on the merits of issues to the evidentiary stage of the proceeding, there are still further problems involved in the activation and expedition of a new route proceeding which are as yet not provided for by the Board's regulations in any way. Thus, section 401(b) of the Act provides that an application for a certificate of public convenience and necessity shall be served on such interested persons as the Board regulations require. The Board has adopted no regulations requiring such service. Aside from the "protest" and "memoranda" provisions already noted, section 401(c) of the Act provides that, upon filing, the Board is to post a notice of an application for a certificate of public convenience and necessity in its offices. It also provides for notice by the Board "to such other persons" as the Board regulations require. The Board has adopted no regulations requiring such notice. Section 401(c) also provides that the application "shall set for public hearing" which is to be disposed of "as speedily as possible." The Board has adopted no regulations

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governing the matter of priority in setting down applications for hearing. As to amendment of certificates, section 401(g) provides that, on petition, complaint, or on its own initiative, the Board, after notice and hearing, may amend a certificate. The Board has adopted no regulations as to service or even as to notice of applications for such amendments.[87]

Since there is a practical limit to the number of cases which the Board can hear, but no limit to the number of applications that can be filed with the Board, there is always a heavy backlog of certificate applications and certificate amendment applications for which no hearing has been set. TWA and United complain that American's proposal for the third nonstop New York-San Francisco service was heard out of turn on the Board's docket. Admittedly, the proposal of American, as well as the proposal of Northwest, were set for hearing out of turn as have dozens of other certificate applications been heard out of turn in recent years. The reason for this situation is quite elementary. Upon filing, an application receives an individual docket number. Though the Board theoretically makes some effort to set applications for hearing in a sequence determined by date of filing, in practice, as the Board has pointed out, the "priority-of-filing policy seldom has a chance to operate" and most applications are set for hearing in accordance with considerations having nothing to do with the date of filing.[88] Aside from the problem of whether or not the Board's Principles of Practice were violated by the various efforts made to sever and grant an expedited hearing on American's nonstop proposal on Docket 5903, it is clear that no Rule of Practice of the Board was offended or subverted by the Board's decision to go ahead with an expedited hearing on the nonstop applications of American and Northwest under the Congressional and civic prodding for an early hearing on the former.

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[87] The Board does publish weekly summaries of applications for certificates and for certificate amendments which it has received during the prior week. These summaries are available to all interested persons. The Board, of course, does not thereby purport to give notice of the filing of an application to any particular person.

[88] Order E-14412, September 2, 1959, pp. 19-20, n. 24a.

The Board has no standards or established procedures for determining what application should be set for hearing at any particular time. Sometimes the Board on its own initiative, or after consultation with its staff, will issue an order or notice of prehearing conference announcing that an application or group of applications has been set for hearing. On other occasions the Board has had discussions with cities or carriers who feel that they have a particularly urgent air service problem which should be set for public hearings. Members of Congress and State officials are often active in urging activation of proceedings by the Board both in oral and in written communications. Moreover, as already noted, it is not uncommon for Congressional committees to urge such action.

What is urgently needed is an amendment to the Board's Rules of Practice establishing regulations which provide standards as well as clearly defined procedures under which the Board will sever and set down for hearing applications not reached on the Board's calendar in a sequence determined by the date of filing. Since the very assignment of an application for formal hearing affects vital interests of both the carriers seeking additional certificate authority and the communities to be affected by such authority and in view of the further fact that the Board's decision to go ahead with a hearing on a particular application may be eventually determinative of valuable private rights, it is essential that the carriers and the general public know both the criteria and the procedures under which the Board decides to move ahead out of turn with the processing of a particular proposal for new route authority.

The Board's conference with representatives of San Francisco, and approximately 70 percent of communications in the correspondence file of Docket 9214, occurred in the period prior to the activation of the nonstop proceeding on January 13, 1958. The communications and the conference did not and could not violate the Board's Rules of Practice for those Rules do not purport to cover such communications to or conferences with the Board prior to the time a case has been set for hearing. The Board's recent amendment of Rule 14 covering requests for expedition is a step in the right direction, but the revised Rule is inadequate in that it fails to provide for a simple and reasonable procedure for the service of such requests. Additionally, the Board's Rules of Practice need to be further amended to cover service of applications filed with the Board, notice by the Board of such applications, and necessary standards and procedures for the severance of applications and priority of hearings on particular proposals.

Up to now, at least, there has been nothing improper about the informality of the procedures with the Board before a case has been activated. As a matter of fact, the most recent expression of Congressional interest in the problem of ex parte contacts, H. R. 12731, introduced by Representative Harris on

June 21, 1960, requires judicial formalities to be observed by agencies and litigants before them only after the time a proceeding has been noticed for hearing.

These informal procedures did not in any way contravene the Board's procedural regulations existing at the time of the nonstop case. The Board's Rules of Practice did not set forth any procedures which must be followed when a hearing is being requested. Furthermore, contrary to the arguments of TWA and United, there was no requirement of service upon them of the communications to the Board requesting a hearing. Rule 8, which provides for service of documents filed with the Board, states that a document "shall be served . . . upon all parties to the proceeding in which it is filed . . . ." However, Rule 15 (d) provides that a person becomes a party only when he has been granted intervention in a proceeding. In the nonstop case, prior to January 1958, TWA and United had never sought, much less been granted, intervention in Docket 5903, the docket of American's application containing its request for New York-San Francisco nonstop authority. Accordingly, they were not parties to any "proceeding" and nothing filed with the Board in 1957 relating to Docket 5903 was required to be served upon TWA or United.[89]

TWA and United can scarcely be heard to argue that there was any impropriety in anyone's failing to make service upon them of documents filed before they intervened, for they themselves followed the same course as others having putative interests in the San Francisco-New York nonstop matter but who, like TWA and United, had not yet attempted to become parties. Thus, when TWA and United answered American's motion for expedited hearing, neither carrier purported to serve its document upon Eastern Air Lines -- a New York-San Francisco applicant at the time though its applications were not prosecuted in the nonstop case -- or upon other possible intervenors such as the New York Chamber of Commerce, to name only one of many civic bodies that had an interest in the matter and might have intervened had they chosen to do so. In almost any prospective Board proceeding the list of persons who have an interest and might become parties if they choose, is lengthy indeed, and hence it is incumbent upon those who want to receive service of documents concerning any particular application to intervene in the docket containing it. The Board's Rules of Practice at the time of the nonstop proceeding cannot reasonably be interpreted otherwise, nor were they by TWA and United in their filings, as noted above, nor have they ever been heretofore in any new route proceeding.[90]

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[89] Rule 18 does state that a request for an order or ruling by the Board not otherwise specifically provided for in the Rules of Practice shall be made by motion. But to label such a request a "motion" does not add any service requirement if, as here, no one has yet intervened as a party in the docket to which the request or motion relates. American and San Francisco served their May 1957 motions on TWA and United, but they were not required to do so by any Board rule.

There was only one instance after the activation of the nonstop proceeding of a direct ex parte communication to the Board from a party to the case. That sole instance was a telegram from the Mayor of the City and County of San Francisco dated June 23, 1958, urging that the hearings in the nonstop matter be concluded in July 1958. The Mayor's telegram of June 23, 1958, dealt entirely with a matter of procedure. Communications of the latter sort are commonplace in Board new route proceedings. There are many instances of such communications in other cases urging expedition in the hearings; in other instances they urge expedition of the Board's final decision after the hearings have been concluded. Such requests for expedition are now of course covered by the recent amendment of the Board to Rule 14.

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[90] It is true that the Chairman labeled Mayor Christopher's letter of July 3, 1957, a petition for reconsideration of the Board's denial of American's motion, and complained that the Mayor had failed to serve it "upon the parties to the case." But the Chairman did not point out who these "parties" were, and this letter scarcely changes the fact that there were none. Certainly the Chairman never made a similar complaint about any of the other numerous communications sent to the Board in 1957, even though few of them showed service on TWA and United or on American for that matter. Furthermore, had the Board wished to promulgate rules requiring service of a communication requesting a hearing, it knew how to do so, for in the case of exemption applications -- to which there are no "parties" -- the Board's Rules very carefully specify various persons who are deemed to have an interest in such applications and upon whom such applications must be served. (See Rule 403).

TWA takes the position that American violated the Board's Rules of Practice in several respects through indirection. Thus, in its activities in support of its motion of May 3, 1957, for severance and an expedited hearing, American is alleged to have violated the requirement of Rule 18 that "any affidavits or other evidence desired to be relied upon" in support of an answer must be incorporated therein and that American ignored the requirements of the same Rule that answers in support of (or in opposition to) a motion must be filed within a stated period.[91]

At the outset, it must be made clear that no Board Rule has in the past precluded any air carrier applicant in a Board proceeding from fully acquainting all interested persons with the facts and merits of its application. Similarly, the Board has always recognized the right of an applicant to seek support of other parties to a proceeding if such support was sought within the confines of the Board's rules.

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[91] In the nonstop proceeding, the cutoff date for the filing of answers to American's motion was May 14, 1957; but the Board on May 10, 1957, extended the date at United's request to May 28, 1957.

The answers to American's motion submitted to the Board by the Port of New York Authority and the Chamber of Commerce of San Francisco were properly and seasonably filed. The answer filed to the same motion by the Oakland Chamber of Commerce was dated May 27, 1957, but it was not received by the Board until June 3, 1957. While American solicited support from the Oakland Chamber of Commerce for its motion, there is no evidence of record to support the charge that the carrier was responsible for the late filing by the Oakland Chamber of Commerce. This Chamber has long participated in Board proceedings; it is well acquainted with the Board's Rules of Practice; and its failure to file an answer in time was its own responsibility. Again, if the Board had been conscientious about enforcing its Rules of Practice it would have returned the answer filed by the Oakland Chamber of Commerce as having been late filed; but the Board's acceptance of the communications of May 27, 1957, from the Oakland Chamber of Commerce was consistent with its long-standing policy of accepting requests for expedition of proceedings from organizations having a potential interest in a new route matter as well as from persons who are unlikely to become parties without regard to any Rule of its Rules of Practice.

While American did engage in a campaign of solicitation of support for its motion, neither the persons that actively became parties nor the non-parties which filed documents with the Board after the filing of the motion were beholden to the carrier for such communications. It must be emphasized at this point that the municipalities in the Bay and New York areas and the numerous civic organizations at either end of the proposed nonstop route were not neophytes in their associations with air carriers in new route cases and in communicating with the Board either directly or through their Congressmen in new route proceedings. These organizations simply followed a long-standing practice of writing directly to the Board or writing to their Congressmen who in turn communicated with the Board.[92] To the extent such communications can be described as "answers" to American's motion of May 3, 1957, such communications have never heretofore been monitored or controlled by the Board to make sure they technically observed the Board's Rules of Practice as to either form or content.

American continued solicitation of support for an expedited hearing after the denial of its motion on June 26, 1957, and its contact with various non-parties and Members of Congress with regard to oral argument before the Board is more appropriately the subject matter of a possible violation of the Principles of Practice of the Board. The latter problem is essentially one of what constitutes permissible solicitation of community and Congressional support on matters pending before the Board. To the extent there were solicitations by American of communications to the Board prior to the activation of the nonstop proceeding, it has already been demonstrated that the Board has not had until the recent revision of Rule 14 any established procedure under which such communications could be monitored and received by the Board under a specific Board Rule. The carrier's solicitation of interest in oral argument through non-parties has likewise not been circumscribed in the past through an appropriate Board Rule. The proposed further revision of Rule 14 now pending should, if eventually adopted and thereafter enforced, properly bar non-parties from oral argument and obviate the need for the kind of electioneering that has been going on among Members of Congress in all major new route cases.

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[92] The private individuals who wrote to Members of Congress or to the Board regarding the nonstop proceeding likewise followed the time-honored practice of "writing their Congressman" or "writing to Washington" to make their views known. No Board Rule of Practice was violated by such common ex parte expressions of interest because no Rule of the Board purported to cover them.

Following the close of the hearing in the nonstop matter, the San Francisco Chamber of Commerce, with the knowledge of the City Attorney's office of San Francisco, undertook to secure expressions of support for the third nonstop route from local government bodies and chambers of commerce in Northern California that had not appeared at the hearing through a request that such bodies file statements with the Examiner under Rule 14. No decision to follow this course was reached until after the hearing was closed. Miller of the San Francisco Chamber of Commerce discussed the propriety of such a procedure with Needles of the San Francisco City Attorney's office and these two men agreed that such filings under Rule 14 were permissible. As had been done in many other new route proceedings, Examiner Bryan accepted statements for the record under Rule 14 of numerous municipalities and civic groups which had not appeared at the hearing.

The record is clear that American was not in any way responsible for Miller's solicitation of the Rule 14 statements after the close of hearings. While Miller did consult with Needles as to the propriety and permissibility of the procedure, San Francisco was likewise in no way responsible for Miller's activities in this regard.[93]

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[93] In circulating the proposed draft of a statement under Rule 14 to government units and chambers of commerce in the Bay area, Miller's accompanying letter was careful to call attention to Rule 14 and the Rule's provisions with respect to form, content, service and time of filing.

There can be general agreement with TWA that the interpretation of Rule 14 as it existed at the time of the nonstop case to the effect that for a person or organization to qualify to submit a written statement to either the Examiner or the Board, such person or organization must have appeared and presented his statement at the hearing. However, this has not been the practice of either the Board or the Board's Examiners in new route proceedings. Statements on the merits of new route proposals have generally been accepted by Examiners in lieu of briefs from persons who had not appeared at the hearing. Similarly, the Board has had a consistent practice of accepting such statements from municipalities and various civic or trade associations after the Examiner's Initial Decision.

With respect to American's contact with Members of Congress, either directly or through travel agents for the purpose of having Congress appear at oral argument or to write to the Board in lieu thereof, the activity in question is almost wholly related to a possible violation of the Board's Principles of Practice rather than the Board's Rules of Practice. It is true that permitting Congressmen to appear at oral argument or to submit a written letter or statement in lieu of physical appearance at argument appears to constitute a violation of Rule 14 as it existed at the time of the nonstop proceeding. However, the Board has consistently allowed Congressmen to appear at oral argument under that Rule either in person or by a representative or by written statement or letter. Accordingly, American cannot be held to have violated Rule 14 in soliciting the submission of either oral or written argument by Members of Congress in the nonstop case.

There is no allegation of the violation of any Rule of Practice by American in the filing of the many documents submitted by the carrier in the course of the nonstop proceeding. In the filing of its own papers, the carrier scrupulously observed the Board's Rules of Practice in all respects in the course of the litigation in the nonstop case.

In view of the foregoing and all considerations of record, it is found and concluded that neither American nor the City and County of San Francisco violated any of the Rules of Practice in Economic Proceedings during the course of the nonstop proceeding in Dockets 5903 and 9214. But the facts relating to the alleged violations of the Board's Principles of Practice by the two parties do not free the parties from blame with respect to the latter Rules.

Principles of Practice. - The Board's code of ethics or the standards of practice, as attached hereto in Appendix B, preclude "private" communications on the "merits" in cases "to be determined after notice and hearing," and further declared it to be improper for any person to attempt to bring pressure on the Board in such cases. These principles adjure, in their own words, the "highest standards of judicial and professional ethics." They insist that, in adjudicatory matters, "the Board's judicial character be recognized and protected."

While the Board's standards of practice in effect at the time of the nonstop proceeding appear simple and forthright in their terminology, these standards suffered from numerous built-in ambiguities and contradictions. Cognizant of a serious need for clarifying and amplifying its code of ethics or standards of practice, the Board made effective on December 6, 1960, by Regulation No. PR-43

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wholesale revisions in those Rules as a result of the rule-making preceeding instituted on March 18, 1960, in Docket 11221.

The Board received comments and suggestions from 49 practitioners before the Board during the course of the rule-making proceedings in Docket 11221. The proceedings in Docket 11221 disclosed a marked divergence of views as to the proper scope of any ban on ex parte communications in Board procedures. Particularly troublesome were the twin problems of Congressional appearances at oral argument and the extent to which air carriers should be permitted to solicit support for their proposals from civic parties to a proceeding. With respect to the phrase "ex-parte communication" and the term "pressure," there have long been differences of opinion in many areas, including the definition of the terms themselves.

To start with, it must be borne in mind that regulatory agencies are not courts, notwithstanding that some major aspects of their duties involve what may be termed as judicial or quasi-judicial functions. As in the case of other regulatory tribunals, the Board is presumed to be an expert in its particular field of activity, a status acquired only by a thorough knowledge of the industry. Moreover, the Board must deal on a day-to-day basis with the manifold aspects of the airline industry which it regulates, in terms of the administration of the regulatory statute, prescription of rules, and case-to-case adjudications. Accordingly, there cannot be as to all the functions of the Board the same isolation from discussion and public and industry contacts which normally characterize a good court of law.

It has been widely recognized in recent years by students of the administrative process, by various bar groups devoting their time to the problem of the desirability of more judicialization in the administrative process and by various committees of the Congress working with the same problem that the various regulatory tribunals are not as yet regarded as courts.[94] Apart from the question of the desirability for such regard, the regulatory agencies in the past have experienced great difficulty in preventing communications to them from non-parties with respect to the many judicial matters pending before them, although it must be conceded that the various regulatory agencies could have done more in proscribing the incitement of active pressure campaigns on the part of units of the industries which are subject to the direct jurisdiction of the agencies. Further, there has been a widespread belief that spontaneous communications to a regulatory tribunal from non-parties are not entirely improper and cannot be wholly controlled, and that indeed it is no doubt desirable for the regulatory agencies to be aware of and responsive to public opinion, in contrast to being responsive to private interests attempting to assume the guise of public opinion through direct or indirect pressure campaigns of various kinds.[95] Additionally, there obviously are many inquiries and communications, oral or written, which neither constitute attempts to exert pressure nor can be considered communication on the merits. These include requests and communications from persons who need the information in the discharge of their own duties such as answering information requests received by the White House, Members of Congress, Governors of States, Mayors of cities, and departments of Federal, State and local governments. While the Board has not seen improprieties in such inquiries in the past, it nevertheless has had a policy of placing such communications in the public correspondence docket of the matter to which they related to avoid any suggestions of impropriety in receiving "private communications."

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[94] For an excellent discussion of the problems involved in the judicialization of the administrative process in the light of some of the current dissatisfactions with the administrative exercise of judicial power, see, Auerbach, Should Administrative Agencies Perform Adjudicatory Functions? 1959 Wis.L. Review 95.

[95] Even here there may be some room for difference of opinion as to the circumstances in which a litigant may legally "take his case to the public." Moreover, the Board has long held it unobjectionable for an air carrier to attempt to enlist the support of Members of Congress, cities, chambers of commerce and other civic groups. See, for example, letters of Chairman James R. Durfee dated October 30, 1959, February 17, 1960 and April 7, 1960, respectively, on this latter subject in the Southern Transcontinental Service Case, Docket 7984. These letters of Chairman Durfee's are found in the correspondence docket of that proceeding and ruled on protests of certain of the applicants of that case with respect to the activities of a competing applicant.

On the other hand, deliberate attempts at personal influence as such to achieve a particular result in an adjudicatory proceeding are in an entirely different category, as are private audiences with litigants or their attorneys, "back door" or clandestine contacts through third persons, unusual hospitality, as well as private or ex parte communications on matters which should be determined on notice to all of the litigants made parties to a particular proceeding. With respect to pressures and ex parte communications to exert such influence, it is universally agreed that it is wholly improper to attempt to obtain favorable recognition solely on the grounds of personal or political influence, through fear of retaliation of some kind or another or by otherwise exerting pressures as such in furtherance of private goals. There is likewise universal agreement that regulatory agencies should not succumb to such attempts at influence and further should discourage and prevent such attempts in every way possible.[96]

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[96] "In the last analysis, the quality of justice depends upon the quality of the men who administer it . . . ." Auerbach, 1959 Wis. L. Rev. 116.

But determining just what constitutes such attempts at improper pressure or influence is quite another matter in many circumstances. Persons occupying high places in business or government or otherwise deemed to be influential, whether in or outside the government, should not perhaps in all cases be barred from expressing or having considered their legitimate interests merely because they are influential. If, for example, another government department, official, or a Member of Congress has a proper interest on the merits of a given Board matter or contemplated action, the Board in the past has perceived no impropriety in that interest being communicated to it through customary and normal channels.[97] And if such channels are provided by an agency, they should generally be the same for all persons, whether they work in the White House, are Members of Congress, Federal, State or local officials or are just a plain Mr. Citizen in any part of the country. In other words, if what are generally termed ex parte communications or discussions may have been considered proper in the past in relationship to a given subject matter, they should not become the less so merely because of the identity of the individual involved. Similarly, if, as has been the Board's practice in the past, the area is one in which all representations by persons outside of a case should be publicly made, ex parte communications to or information from Board sources can be justified only under the normal concepts of withholding information which should not be released to others than properly interested Federal officials or because of security or other valid considerations. All of which leads, of course, to the very difficult question of the kind or types of situations in which ex parte or private communications must be held to be outside the bounds of propriety in this reopened proceeding.

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[97] There are now and no doubt always will be borderline cases and considerable differences of views in various quarters as to whether it is in fact a legitimate interest on the part of the communicant or whether more is intended than the expression of legitimate interest. These are problems which are inherent in the very natures of the subject involved, and involve questions such as whether Members of Congress should take a position on the merits or even on procedures, or whether other agencies or officials should do so. These are matters which heretofore have been thought to be largely beyond the Board's control. This problem is not so much communications as such, but rather the way in which they are made. It is the surreptitious, clandestine or "back door" approach in such cases which is reprehensible.

At the time the Board ruled on the allegations of TWA and United in its opinion and order of November 19, 1959,[98] the Board found that, in their most unfavorable light, some of the communications which came to it during the litigation of the nonstop proceeding might have constituted a technical violation of its standards of practice, but that they are wholly different in character from the type of private, clandestine - and even worse - activities involved in the "influence" cases before the Federal Communications Commission. This reopened inquiry has not revealed any significant communications to the Board which were not duly filed in the public correspondence dockets of the nonstop proceeding.[99] Now as before there is not the slightest hint of venality or corruption, private, secret or clandestine activities or premeditated wrongdoing on the part of any of the parties to the nonstop case, or on the part of any staff member, Examiner or Board Member, as there was in the cases recently before the Federal Communications Commission.[100]

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[98] Order E-14664.

[99] One of the communications sent to the Board but missing from the correspondence file was Mayor Christopher's letter of January 30, 1959, sent to the Governor of California, the two Senators from the State of California and numerous Members of the House of Representatives from the State of California. This letter was transmitted to the Board by two Members of Congress from California but the Mayor's letter was returned to the Congressmen at their request. The Mayor's letter of January 30, 1959, detailed the procedure delays referred to by the letters of the two Members of Congress from California which were placed in the public correspondence file. Certain other correspondence to the Board was returned to Members of Congress at their request, but no evidence was adduced during this reopened inquiry to enable the trier of facts to ascertain the nature of the remaining returned communications. With respect to oral communications by Members of Congress with Board personnel, the record in this reopened inquiry reveals no more than routine inquiries as to the procedural status of the nonstop proceeding.

In its November 19, 1959, opinion and order, the Board spelled out at some length the areas where its then existing standards of practice were unclear. It recognized that there was a serious question as to whether the prohibitions of its principles of practice applied to a procedure requesting the institution of an evidentiary hearing on a new route application. It further stated that there was also some question as to whether communications are "private" even when no confidential treatment is requested and they are made public as a matter of course in the correspondence file. Moreover, the Board then wondered whether communications are "on the merits" even though they - as do many of the letters in this proceeding - relate solely to matters of procedure or routinely transmit material without comment.

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[100] Six of the seven F.C.C. cases involved private communications with a Commissioner by an applicant, his agent, or persons with a direct pecuniary interest in the outcome of the case. Two of the cases have been decided by the Commission pursuant to Court remand: WKAT v. F.C.C., 258 F.2d 418 (1958), on remand, In re applications of WKAT, Inc., et al., 29 F.C.C. 216 (1960) (private discussion between applicants and a Commissioner on the merits of the case and attempts to corrupt a Commissioner by two of the applicants); Massachusetts Bay Telecasters v. F.C.C., 261 F.2d 55 (1958), on remand, In re applications of WHDH, Inc., et al., 29 F.C.C. 204 (1960)(private meetings between officers of two applicants and a Commissioner designed to influence the Commissioner's judgment on the merits). In two other cases, Initial Decisions have been issued by a Special Examiner: In re applications of Biscayne Television Corp., et al., 20 P&FRR 715 (1960), reopened by the Commission on its own motion (private approaches to a Commissioner by three applicants with intent to corrupt the Commissioner); Sangamon Valley Television Corp. v. United States, 358 U.S. 49 (1958), on remand, 269 F.2d 221 (1959), on remand, 19 P&FRR 1055 (1960) (prospective licensee communicated with Commissioners both by personal visits and private letters and sent gifts to the Commissioners). Two other cases await consideration on charges that applicants privately discussed the merits with a Commissioner: WORZ v. F.C.C., 358 U.S. 55 (1958), on remand, 268 F.2d 889 (1959); In re applications of City of Jacksonville, et al., reopened by the Commission on its own motion, 20 P&FRR 1087 (1960); see also Hearings on Investigation of Regulatory Commissions and Agencies before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 85th Cong. 2d Sess. 3260-3278 (1958). The seventh case, WIRL Television Corp. v. United States, 358 U.S. 51 (1958), remanded, 253 F.2d 863 (1958), apparently was remanded because of an interrelationship with the Sangamon case. Moreover, the facts adduced in this reopened inquiry are unlike the willful wrong in an earlier F.C.C. situation as ruled upon in Communications Comm'n v. WOKO, 329 U.S. 223 (1946).

The Board then found, as it necessarily had to, that the "ambiguity" of its Rules may have resulted in doubt as to the standards of conduct required prior to the institution of the evidentiary hearing in the nonstop case on January 13, 1958. This finding is reinforced by the evidence adduced in this reopened inquiry as to American's and San Francisco's understanding of the Rules that were applicable prior to the institution of the hearing. Prior to the activation of the nonstop case on January 13, 1958, American acted on a view of the Board's Rules and standards of practice to the effect that before a matter had been set for hearing there was no fixed procedure for communications to the Board or for the service of such communications on other persons. American's activities after the start of the proceeding, insofar as they relate to the communications in the public correspondence file, were based on a view that it was entirely proper under the Board's Rules and code of ethics for carriers to advise Members of Congress and the municipalities affected by their applications as to the nature of their proposals for new route authority; that it was entirely proper for carriers under aforesaid Rules

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and principles to solicit support from persons having a putative interest in a potential proceeding for an early hearing; and that it was likewise proper for carriers to advise Congressmen of the facts relating to a new proceeding which might be of substantial interest to their constituents. San Francisco's actions prior to the activation of the proceeding were governed by a view of the Board's Rules and standards of practice similar to that of American but independently arrived at.

Since it was not uncommon to hold conferences with civic groups similar in character to the Board's December 2, 1957, conference with the representatives of San Francisco, both American and San Francisco were of the mind that the informal conference of the Board with the representatives of San Francisco prior to the activation of the evidentiary hearing was entirely in accordance with the Board's Rules. Neither the City of San Francisco nor the carrier saw any impropriety in the carrier's close collaboration with the City in either the preparation of the City's papers requesting an expedited hearing or in the later preparation of the City's evidence to be presented at the hearing.

American likewise saw no impropriety in its press representative's numerous contacts with the daily newspapers of the Bay area, including the circulation of various background memoranda to the nonstop matter both before and after the evidentiary hearings. Finally, neither the carrier nor the City of San Francisco viewed the communications which came to the Board after the activation of the hearing as being repugnant to the Board's standards of practice, including several letters submitted by Members of Congress at the time of oral argument which, in several instances, were inspired or requested either by the carrier or by the City of San Francisco.

In its December 6, 1960, revision of its code of ethics or standards of practice the Board clarifies its earlier definitions of the phrases "private communications" and "on the merits." In the same revision the Board has also established guidelines as to what constitutes improper solicitation in a proceeding on the part of a party and it further established at what stage in a proceeding the Rule concerning improper attempts to influence becomes applicable.

Both the preamble to the revised code of ethics or standards of practice and the changes made in the pre-existing Rules suggest that the recent revision of the Board's code of ethics is almost entirely preoccupied with the specific questions raised in the nonstop proceeding. The Board's revised standards of practice defines "a private communication on the merits" as a written or oral communication on "any substantive or procedural issue in the case" by any person, either in public or private life. Thus, procedural issues, including the issue of whether or not a proceeding should be activated or expedited, are now issues on the merits for the purpose of the Board's new Rule against private communications. But communications which merely make inquiry as to the status of a proceeding without discussing issues are not considered communications on the merits.

With respect to the issue of solicitation, the Board's recent revision of its standards of practice recognizes that its pre-existing Rules did not expressly prohibit parties from soliciting persons to support their positions either by their participation in the hearing or, in some cases, by direct communication with the Board. Recognizing that solicitation of support by an air carrier did not necessarily constitute an effort to bring pressure to bear on the Members of the Board or its staff, the revised Rules contemplate that such solicitation will continue to be proper if expressed within the framework of the Board's new procedural rules and its revised standards of practice. The Board, accordingly, wrote new language into its standards of practice which would make it improper for a party to any proceeding to engage in any activity which may reasonably be expected to result in communications to the Board or its staff in cases where such communications are not served upon all parties or orally presented at a hearing or oral argument. Additionally, the Board has established some guidelines as to what constitutes improper solicitation and the revised standards make it improper for any party to solicit communications to the Board or its staff other than proper communications by parties or non-parties specifically permitted under Rule 15 and the revised Rule 14 of the Board's Rules of Practice. Moreover, the revised standards of practice provide that any party soliciting the support of any person must call such person's attention to the provisions of Rules 14 and 15.

The revised standards of practice provide for a number of other changes. Among these further changes are several which have direct applicability to the problems raised by this reopened inquiry. Thus, with respect to matters required by the statute to be decided after notice and hearing, such as a proposal for new or additional air service, the revised standards are made applicable from the time an application is filed in a new route case. The amended standards of practice further state that where appropriate in the public interest the Board may deny a party which violates these standards of the relief it seeks in a proceeding. Moreover, requests for the activation of an expedited hearing on a pending new route application will henceforth be considered "a communication on the merits."[101] Finally, by a further Proposed Rule-Making proceeding instituted on December 1, 1960, the Board is considering a new amendment to its Rules of Practice which would withdraw from persons who are not parties to a proceeding the privilege of presenting statements or oral argument to the Board after the hearing before an Examiner is concluded. This latter proposed Rule would eliminate oral arguments to the Board now permitted by Members of Congress, spokesmen for the Federal executive departments or agencies and State aviation commissions. If the latter agencies were permitted to intervene as formal parties to a proceeding, they presumably would be entitled to orally argue before the Board even though they did not submit evidence at the hearing or otherwise participate in the proceedings before the Examiner.

It would seem beyond argument that the Board's principles of practice need further revision. As the revised principles now stand, any prohibited communication in writing to the Board or its staff is to be made public by placement in the correspondence file. For obvious reasons, this isn't going to help much. The only way effectively to handle prohibited communications is to send them back to the communicant, whether the latter is the White House, a Member of Congress or anyone else. Moreover, with respect to attempted oral communications on the merits of any pending matter - procedural or otherwise - such improper oral communications should be reduced to writing by the Board or staff member receiving them and a written abstract of the attempted oral communication should be served upon the communicant as well as upon each party to the proceeding. The two foregoing suggested procedures would go a long way to stop the present ex parte attempts at meddling into Board affairs.[102]

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[101] As already noted herein, requests by non-parties for the activation or expedition of an application must hereafter be made in accordance with the Board's recently revised Rule 14 which provides for a new procedure whereby interested persons other than the parties may request that a proceeding be activated or expedited. Under the revised standards of practice, a request for activation or expedition of a proceeding which is not made in accordance with the Board's Rules of Practice will be placed in the public correspondence file of the proceeding and will not be considered by the Board.

One of the primary difficulties with the administrative process is the ambivalent nature of the regulatory tribunals. For years various members of the regulatory agencies have been assuring their Congressional inquisitors that their respective tribunals are only "a creature of" or "an arm of" the Congress, thereby restating the obvious regarding the delegation of functions which conceivably the Congress could exercise on its own. In matters such as rule making and certain other questions of broad policy, the tribunals are of course a direct agent of the Congress. But the Federal Aviation Act and the Administrative Procedure Act require that the Board's adjudicatory functions in hearing cases be conducted in the manner of a court. And, like the Civil Aeronautics Board, certain of the agencies have self-imposed codes of ethics telling the world that in matters of adjudication requiring notice and hearing the agency must follow the canons of judicial ethics imposed upon judges in regular courts and that their practitioners must follow the canons for professional conduct prescribed for lawyers practicing before such courts.

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[102] While not all of the ultimate findings herein made are necessary to the disposition of the basic issues of this reopened inquiry, it does appear appropriate to view the questions posed by this proceeding in the larger context of the overall relations between the Board and non-parties seeking a voice in adjudicatory matters in general.

An eminent local jurist has posed the distinction inherent in the ambivalent nature of regulatory agencies with precision. The Hon. E. Barrett Prettyman, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit and Chairman of the President's Conference on Judicial Procedure, recently spoke as follows:

> "Much talk is heard around Washington about pressure by members of the Congress, and bills have been introduced to prohibit communications by congressmen with commissions in respect to pending cases. It is a difficult problem. In rule-making, in which the agency is an agent of the legislative branch, policies and programs in accord with mandates of the electorate are proper. Indeed they are required. Thus consultation between legislators of the dominant party and the legislative agents is proper and even necessary . . . But, on the other hand, when an agency embarks upon an adjudicatory function, in which it is an agent of the judiciary, acting in a quasi-judicial capacity, totally different rules apply. Politics of any sort, high or low, in this area is a gross violation of public trust." 103/

Well, what has happened in the regulatory agencies is that which generally happens when what is practiced is at wholesale variance with what is preached. Certain agency members, many agency practitioners and an alarming number of Congressmen have ignored or blurred the distinction between policies which are properly matters of Congressional intercession with agency members and adjudicatory functions which are solely the province of an agency and its Examiners. 104/

103/ Trial by Agency, Virginia Law Review Association, Published Lectures of Judge Prettyman given at Virginia Law School in March, 1959, page 9.

104/ As the Court stated in People v. Giles, 161 P. 2d 623, 628 (1945): "The universal aid is evidence . . . It is the only means by which a judicial determination can be had . . . ."

One has only to read the correspondence files in the New York-Mexico City Nonstop Case, Docket 2909, the New York-Florida Case, Docket 3051, and the Great Lakes-Southeast Service Case, Docket 2396, as well as other Board new route proceedings, to appreciate the extent of Congressional intercession regarding matters in which the evidentiary record made before the Examiner should be the exclusive record for argument before the Board and for Board decision. And one can only conjecture to what further extent the fair administration of justice in adjudicatory proceedings before regulatory tribunals is put to peril by other Congressional activities. A simple telephone call to an agency or staff member on the merits of a matter could be more effective than a dozen letters routinely placed in the public correspondence file. That is why the adjudicatory process before regulatory tribunals must somehow and in some way be sealed off completely from political tinkering.

No single aspect of Board procedures in adjudicatory proceedings has caused so much dismay and dissatisfaction in the Board's staff, so much suspicion and recrimination among the practitioners before the Board and the industry clients they represent and has so detracted from the dignity and respect due the Board's judicial functions as has the appearance and participation of Members of Congress before the Board in oral argument. The inevitable question during such appearances, particularly when a Congressman speaks on the critical issue of air choice, is who has gotten to whom and for what purpose? To be sure, the query may be unfair and the suspicion it engenders may be groundless; but the appearance of fairness, which has always been the sin qua non of trustworthy judicial proceedings, is seriously and needlessly brought to doubt by the presence of and argument by Members of Congress.

Illustrative of the perils of Congressional appearances at oral argument before the Board are remarks which have gleaned from a study of the oral arguments in many new route proceedings. It is not unusual in such arguments to find Members of Congress either praising or berating the findings of Examiners or making a pitch for the choice of a particular carrier. Whether the Congressmen in all cases read the considerable records in new route proceedings or even the Examiner's supporting findings on important issues is not known. What is known, however, is that the Congressman in most cases fail to address themselves at all to the numerous major considerations of record which underpin the Examiners' decisions.[105]

Allowing Members of Congress to argue orally the merits of new route cases before the Board has unquestionably been one of the major weaknesses of the Board's Rules. As in the case of American and San Francisco, it has given carriers and cities the excuse to solicit Congressional support on the merits of questions whose disposition should be restricted to the confines of the formal record.

Congressional contacts invariably generate counter-contacts. As in the case of contacts in the solicitation of support from civic groups, activity on the part of one applicant on Capitol Hill generates counter-activity on the part of another. All the major air carriers have representatives on Capitol Hill as well as contact men in the various cities affected by large new route proceedings. Most of an air carrier's activities on Capitol Hill are entirely legitimate. Likewise, an air carrier may properly assist a civic party in its new route problems. But as is abundantly clear from the record in this reopened inquiry, some of the activities of air carriers on Capitol Hill as well as some of their contacts with civic groups are rather thinly disguised electioneering for Congressional and civic support of new route applications.

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[105] What effect does a Congressman's argument have on the five men good and true who sit as the Board on the bench listening to him? God alone can answer this question, and to paraphrase one of the less famous aphorisms of Abraham Lincoln, the good Lord does not speak to us poor mortals in situations like that. But there is widespread authority for the proposition that similar efforts, even where inadvertent, have a capacity to influence the best trained judicial minds. See, for example, Peck v. Pierce, 163 Conn. 310, 28 Atl. 524 (1893); McLaughlin v. Los Angeles Ry. Corp., 180 Cal. 527, 182 P. 44 (1919); Rapson v. Leighton, 187 Mass. 432, 73 N.E. 540 (1905); People v. Giles, 70 Cal. App. 2d 872, 161 P.2d 623 (1945); State v. Simms, 131 S.C. 422, 127 S.E. 840 (1925); Commonwealth v. Johnson, 348 Pa. 349, 35 A. 2d 312 (1944); United States v. Shaughnessy, 21[illegible] F.2d 77 (2d Cir., 1954); and Community Broadcasting Co. v. Federal Communications Commission, 274 F.2d 753, 759 (D.C. Cir. 1960).

The foregoing does not mean that Members of Congress, Governors, Mayors and other public officials may not participate in Board proceedings. They can appear and give relevant and material testimony during the hearing before the Examiner, as a number of Members of Congress and numerous other public officials did in the Southern Transcontinental Service Case, Docket 7984, as well in other new route proceedings before the Board. Indeed, much of the probative evidence on the need for the complex of air services found required by the Examiner in Docket 7984 came from Congressmen, other public officials and civic witnesses who were able to testify from detailed knowledge of the areas they represented.

The Congress as well as the White House have each of course a legitimate interest in proper administration of the statutes entrusted to regulatory tribunals. There can be no quarrel whatsoever with that interest except as it has in the past involved interference in the decisional process in adjudicatory matters. Fortunately, there are strong signs in this record that neither

Members of Congress nor the Executive Department normally want any participation in the latter function of the regulatory agencies. Senator Kuchel, for example, for years has had a strict policy of not appearing before regulatory agencies in behalf of anyone. Except for some routine transmittals of information which come to the White House, the Executive Department refused to intercede in any way in the proceedings on the nonstop matter. There is perhaps no doubt that all Members of Congress will be glad to be freed of the necessity of appearing before the Board in any adjudicatory cases once the Board makes its proposed new policy in this respect effective.

The principal vice of improper ex parte communications via the telephone is that they can so easily result in what the late Judge Jerome Frank called "unconscious influences."[106] Since sub rosa telephone conversations are so easy to make and so hard to detect, it is additionally necessary that the Board revise its principles of practice to require the transcription by the recipient of such calls as relate to the merits of any procedural or substantive issue and the service of that transcription upon the caller as well as upon each party to the proceeding. If the principal objection to such procedure is that it would require a lot of work, the simple answer is that such work would not be wasted. Moreover, it is doubtful that there would be very many of such telephone calls once the Board announced to the world the foregoing rule proscribing them. Further, the Board is also apparently troubled with the inherent dangers of an ex parte transcription of an oral communication on the merits of a pending matter.[107] The obvious answer to the latter difficulty is that if an oral communicant fears that a Board or staff member may not report his conversation or attempted conversation correctly, the attempt at oral communication should not be made in the first place. Finally, an opportunity to answer or rebut a transcribed oral communication on the merits should be a sufficient safeguard against the dangers of improper reporting.

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[106] United States v. Shaughnessy, 219 F. 2d. 74, 80-81 (2d Cir. 1954). The Supreme Court reversed the result in this case (394 U. S. 280) but without disturbing Judge Frank's survey of the history of hidden persuasion.

It is well known that because the Board has a promotional function with respect to civil aviation as well as legislative and judicial functions, it is necessary for the Board and its staff to make inspections of airport and maintenance facilities, conduct informal conferences with airline leaders with respect to planning for the industry in various ways, and even engage in ex parte meetings with air carrier personnel and airline lawyers in numero non-hearing situations such as exemptions from provisions of the Act, air charter problems, equipment programs, air carrier financing, rates for the transportation of mail, negotiation of bilateral agreements and a host of other and similar activities. Consideration has been given by the Board to expand the applicability of the principles of practice to include certain situations of a non-hearing nature, such as exemptions under section 416(b) of the Act, which often involve adversary issues. Under the recently revised code of practice, the prohibition against ex parte communications in non-hearing cases is made applicable in the discretion of and upon order of the Board. Providing notice and an opportunity of non-parties to participate in staff or Board meetings in adversary non-hearing situations should be made a specific and mandatory requirement of the principles of practice.

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[107] Preamble to Regulation No. PR-43, P. 3, *supra*.

Extra record contacts with the industry and officials outside the Board in an adjudicatory proceeding may in rare instances provide useful information to the Board not of record; but the price that is paid for such information is a flagrant disregard for the fair administration of justice. More often than not the result that is sought through off-the-record contacts is not the transmittal of relevant extra record data, but emphasis upon considerations already of record which interested litigants fear a staff or Board Member may have somehow missed either through lack of time or diligence or both. Similarly, through an incessant barrage of communications on the need for "expedition" to a Board or a staff member, an interested litigant may succeed in impressing the uninitiated or naive with undue importance of communicant's cause. And equally serious is the always real and obvious danger that frequent off-the-record contacts and communications with those who must decide, even on matters as apparently innocent on their surface as requests for "expedition", might well result in a miscarriage of justice in terms of the record through an adverse reaction on the part of the arbiter because no self-respecting person likes to be "pressured" or "threatened" by anyone, however powerful his status or subtle his methods. Fortunately, in most cases, the nonsense and nuisance of out-of-court contacts are but a spur to the coldest and most severe kind of objectivity.

When it comes to the problem of more judicialization of the processes of the Board in cases to be decided after notice and hearing, there is nothing wrong with Board procedures that a bold and vigorous program of enforcement of an adequate code of ethics cannot solve. No amount of well-meant rule making without determined action on the part of the Board will help. An unenforced rule is perhaps worse than no rule at all. Nor can it be contended that more judicialization of the Board's processes will make it less responsive to the public interest. In the larger areas of public policy, the Board remains accountable to the Congress for direction. Moreover, in order to carry out its responsibilities of fostering the sound development of air transportation, not only from the standpoint of present requirements but also from the viewpoint of future growth, the Board already has ample non-judicial powers for industry investigation and study, for research and planning and for close and continuing cooperation with other agencies and departments of the government. In addition to the foregoing informal instruments of regulation, the Board is free in numerous situations to utilize its powers of rule making as an alternative to the processes of adjudication in the exercise of its functions. But independence, objectivity and integrity on the part of the regulators are as important to the non-judicial processes of an agency as they are to its formal judicial proceedings.

American and San Francisco must be judged in this reopened inquiry by the principles of practice which were in effect at the time of the litigation of the nonstop proceeding. In terms of specifics, just what did American and San Francisco do or attempt to do, if anything, which must be condemned as violation of the Board's code of ethics or standards of practice?

Approximately 70 percent of the allegedly offensive communications in behalf of American and San Francisco were received by the Board prior to activation of the nonstop proceeding on January 13, 1958. The findings of ultimate facts regarding those activities and communications will be presently stated.

American on May 3, 1957, and San Francisco on May 7, 1957, filed documents with the Board requesting an expedited hearing on American's proposal for a third San Francisco-New York nonstop route. These filings were made after consultation between representatives of carrier and officials of San Francisco. The carrier and the City worked in near unison on this project. After the filing of the papers requesting an activation of the nonstop proceeding, American and San Francisco sought supporting resolutions from various municipalities and civic groups in the Bay area. A number of resolutions and letters were sent by these civic organizations to the Board and to some Members of Congress from the State of California. The Mayor of San Francisco also wrote numerous letters to the Board on the alleged need for a new nonstop proceeding, and he and other officials of the City of San Francisco sought the support of various Members of Congress from California as well as support from California State officials and political leaders. American advised a number of Congressmen of its May 3, 1957, filing; but the carrier did not specifically ask the Congressmen to do anything at that time. Moreover, the carrier contacted a number of travel agents in the Bay area as well as some travel agents in the New York area regarding the carrier's efforts to have its application for the nonstop route advanced on the Board's docket. A number of the Members of Congress contacted by San Francisco, by other civic groups and by American wrote letters to the Board urging an early hearing.

American was in regular contact with the daily press of the Bay area after the filing of its request for an expedited hearing on May 3, 1957. The carrier inspired much of the newspaper publicity, both in the form of news stories and editorials, which appeared in the daily press of the Bay area following the filing of the carrier's request for a new nonstop proceeding. The Office of the Mayor of San Francisco made a collection of various newspaper editorials and articles supporting San Francisco in its endeavor to obtain an early hearing on the nonstop issue and a large number of such editorials and articles were transmitted by the Mayor of San Francisco directly to the Board.

San Francisco's efforts to enlist the support of various public officials, including certain Members of Congress, as well as the support of numerous civic groups in the Bay area, were consistent with the City's past practices in new route proceedings. While San Francisco consulted with representatives of American regarding such efforts, the activities and efforts of the City as well as those of other civic groups in the Bay area were not directed or dominated by American.

On June 26, 1957, the Board denied the request for an expedited hearing on American's application but it ordered a staff study of San Francisco-New York air service problems. Of the total 134 communications to the Board in the public correspondence file of the nonstop proceeding, 77 or almost 60 percent are dated between May 3, 1957, and June 26, 1957. TWA and United had direct notice of many of these communications.

There was nothing unusual about American's contacts with the officials of San Francisco, Members of Congress or the various civic groups in the Bay area, or in the carrier's efforts to interest public officials and civic organizations in the carrier's desire for an expedited hearing. Similarly, American's contacts with the press in connection with the nonstop case are not without precedent in Board proceedings, although the carrier's distribution of press releases and memoranda to editors to various newspapers in the Bay area was somewhat more intensive and better organized than the publicity efforts of other carriers which are of record in this case. Whether American's efforts at publicity for its cause in the nonstop matter transgressed the bounds of judicial propriety will be hereinafter analyzed in more detail. Further, there is nothing about the so-called ex parte contacts in connection with the nonstop proceeding that distinguishes it from a typical new route proceeding before the Board, either in nature or volume of such contacts. Indeed, the ex parte communications contained in the public correspondence files of other new route proceedings were in some cases even more vigorous in their demands for specific Board action than those which are found in the public correspondence docket of the nonstop case.

After the denial by the Board of the request for an early hearing on the nonstop issue on June 26, 1957, a member of the Board's staff visited San Francisco to discuss the San Francisco-New York air service problem with Bay area officials and other interested persons. The public correspondence file contains a total of 16 important communications to the Board during the period after denial of the request for an expedited hearing and prior to January 13, 1958, when the Board, by divided vote, ordered a hearing on

American's application. Among these communications were two letters from the Mayor of San Francisco -- both of which were sent to TWA and United -- and one from a San Francisco civic organization. There was a letter from an East Coast Congressman transmitting a letter he had received from a constituent. The remaining letters were from California Congressmen in response to communications received from the various public officials in the Bay area. All of the communications just noted urged early consideration by the Board of the San Francisco-New York nonstop matter.

In late November 1957, San Francisco sent its State legislative representative to Washington, D. C., to contact members of the California delegation regarding the City's interest in an early hearing. On December 2, 1957, representatives of San Francisco had an informal conference with the Board regarding the Bay area's air service problems. The proposed visit of the San Francisco representatives to Washington to meet with the Board was prominently reported in the San Francisco press. While representatives of American were in contact with the representatives of San Francisco both prior to and after the City's conference with the Board on December 2, 1957, the activities of San Francisco on or about the date of the conference with the Board were not suggested or masterminded by the carrier in any way. A transcript of the conference of December 2, was made available to TWA and United; both the carriers also had notice of the conference through the daily press in the Bay area as well as through a story appearing in a local trade journal.[108/]

Following the activation of the nonstop proceeding by Board order on January 13, 1958, the case assumed an entirely new posture. During the period between the date of January 13, 1958 and September 2, 1959, when the Board issued its order granting American's application for the third San Francisco-New York nonstop new route, there is no question about the applicability of the Board's principles of practice proscribing "private communications on the merits" and "any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the Members of the Board of its staff, or that such person or any Member of the Board's staff, directly or indirectly, gives statements to the press or radio, by paid advertisements or otherwise designed to influence the Board's judgment in the case." Among other problems, the latter part of the proscription of the Board's ethical standards raises the thorny questions of the extent to which a party to a proceeding

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[108/] Prior to the date of the conference with the Board on December 2, 1957, which was held at the request of certain Members of Congress from California, the Mayor of San Francisco wrote to some California Congressmen and included a so-called "Condensed Facts Sheet" summarizing the arguments supporting an early hearing. Although American had not suggested the Mayor should write such a letter, the carrier had provided the City with economic data on the San Francisco-New York matter as early as 1956. These data, in the form of a "Facts Sheet" were revised and brought up to date from time to time. A revised version of the "Facts Sheet" was given by the carrier to the San Francisco City Attorney's office with the knowledge that the City planned to make some distribution of it at that time. The transmittal of the "Facts Sheet" to the offices of the Board by certain California Congressmen and by the White House did not result from any specific request on the part of American.

may legitimately solicit support for its case and the point at which a party's efforts at publicizing its case runs afoul of generally accepted judicial conduct.

A total of 40 some communications in the public correspondence file of the nonstop case are dated during the 19-month period after the activation of the proceeding on January 13, 1958, and prior to the Board's September 2, 1959 decision. San Francisco was in touch at least twice with Members of Congress from the State of California during this period to complain of procedural delays, and nine of the communications in the file during this period are letters from Congressmen reflecting San Francisco's expression of concern over the delays in deciding the nonstop case.

Although American was not directly responsible for these communications, one official of the carrier wrote a highly inflammatory though somewhat confused letter to a member of the Mayor's Committee of San Francisco complaining of the delay in the issuance of Examiner Bryan's decision in the nonstop matter. During this period the Board was unmercifully abused by various editorials appearing in the daily papers of the Bay area. Through ignorance, indifference or sheer irresponsibility, certain of the editorial writers for the daily press in the Bay area treated the Board as a sort of a political dummy to be whacked and kicked around at will. Their editorials showed scant understanding of the judicial processes under which Board new route proceedings are decided and even less appreciation of the proper relationship between a newspaper and a judicial tribunal charged with responsibility for anticipated or pending litigation. Indeed, certain of the editorials hereinbefore referred to hardly credited the Board with a minimum degree of intelligence and industry.

Illustrative of an almost complete lack of respect for the Board and its judicial processes on the part of certain Bay area newspapers was their gloating over the Board's reversal of January 13, 1958, on the issue of an expedited hearing on the nonstop matter and their editorial description of that reversal as a victory for San Francisco's "lobbying" and the Bay area's "political" leadership. It is a tribute to Board's judicial detachment that it voted that reversal on the basis of its study of the problem in spite of the mistreatment it suffered at the hands of certain Bay area newspapers.

American was in almost constant contact with the daily newspapers of the Bay area both before and after the activation of the nonstop proceeding. The carrier's officials made elaborate plans for building up publicity in the Bay area upon the release of the Examiner's Initial Decision, with the carrier hoping that the full impact of such publicity would get to the Members of Congress and the Board. At least one editorial during the pendency of this case on the merits was transmitted to the Board by a California Congressman and another California Congressman brought a sheaf of news stories and editorials from the Bay area press with him to oral argument; but, as already found, the Chairman refused to accept the latter materials for the record.

The remaining communications in the public correspondence file during the January 13, 1958 - September 2, 1959, period are for the most part letters or statements submitted by Members of Congress, public officials in California and a number of private citizens. The correspondence file for this period contains two communications transmitting a resolution of the California Assembly on the nonstop matter. There are also a number of letters in the file during this period from Members of Congress making general inquiries as to the procedural status of the proceeding and transmitting letters received by those Congressmen from travel agents. A few letters also came from private citizens.

The record leaves no doubt that both American and San Francisco solicited some of the letters or statements submitted at the time of oral argument before the Board. American also solicited a number of travel agents in an indirect effort to encourage Congressmen to appear at the oral argument. There is no evidence that the letters which came to the Board from private citizens during this period were directly solicited either by San Francisco or American. It is to be noted, however, that TWA and United had direct notice of most of the Congressional letters and statements submitted at the time of oral argument and they heard the California Assembly resolution read aloud at the oral argument.[109]

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[109] As previously found herein, the only instance of a direct contact by a party with the Board after the activation of the case and before Board decision was a telegram of Mayor Christopher of June 24, 1958, urging that public hearings be concluded in July 1958. The Mayor also wrote a letter dated January 30, 1959, to the Governor of California and Members of Congress from California expressing alarm over the alleged delay of Examiner Bryan's Initial Decision. If the Mayor hoped this letter would come to the attention of the Board, his hope came to pass. Two California Congressmen promptly relayed the letter to the Board.

Both American and San Francisco stoutly deny that they consciously violated the Board's principles of practice at any stage of the nonstop proceeding. Each of these parties to the proceeding insists it acted upon interpretations of the Board's Rules which were reasonably held, particularly in view of the Board's acknowledged uncertainties as to the meaning of very vital provisions of its pre-existing ethical rules of conduct, as well as the Board's past acquiescence in and even acceptance of similar extra-record activities in other new route proceedings. It is argued by American that holding the carrier and San Francisco accountable as violators of the Board's standards of practice would not only be harsh and unfair, but also would be contrary to the well established principle that one cannot be punished for violations of a rule when the conduct proscribed by the rule is not clearly defined.[110] As a matter of fairness and even-handed justice, there is manifest merit in mitigating the consequences of the conduct of American and San Francisco under the ambiguous proscriptions of the Board's pre-existing standards of ethical practice. Such a finding has substantial justification in the failure of the Board to clarify its principles of practice at an earlier date and in its failure to take more action with respect to various improper practices in such proceedings as the New York-Florida Case, Docket 3051, and the New York-Mexico City Nonstop Case, Docket 2909, in each of which even more serious offenses to the judicial process are recorded.

110/ See, e.g., Kraus & Bros. v. United States, 327 U.S. 614 (1946); United States v. Cohen Grocery Co., 255 U.S. 81 (1921).

While the strictures of the Board's rules of ethical practice in effect at all times relevant to this reopened inquiry, particularly those of Rule 2 which, among other things, proscribed attempts at improper influence, could well be read to make them applicable to the important procedural question of getting a case started, such a reading does not jibe with the terminology of the unrevised rules. Before very recently amended, those rules prohibited private communications on the merits of a case to be determined after notice and hearing. It would appear that that prohibition applied to activities aimed at influencing the Board's judgment by off-the-record means in a case to be determined on the record and, accordingly, the prohibition may be held as inapplicable to the mass of communications reaching the Board prior to the activation of the non-stop proceeding. Moreover, the communications involved in the period prior to the activation of the proceeding, if not the activities behind them, appear to be expressly authorized by law in sections 401(c) and (g) of the Act. Even if this interpretation of the Board's standards of practice is in error, and those standards were intended to prevent ex parte communications to the Board with regard to procedural questions concerning applications before they have been set for hearing, there still would be doubt on the question of the violation of these principles because TWA and United did not even seek leave to intervene in the nonstop case until after the prehearing communications had been sent and received and the communicants were therefore under no obligation by Board rules to serve these carriers with copies of their submissions in any event. But regardless of the procedures or lack thereof relating to the activation of a proceeding as

established in the statute or in the Board's Rules, American and San Francisco must, as parties to an adjudicatory proceeding, account for activities and communications which ignored or transgressed the normally accepted standards of judicial conduct. Ambiguities in the Board's rules which were applicable prior to the activation of a proceeding may mitigate, but they cannot completely excuse, such transgressions.

Irrespective of the uncertainties in the Board's pre-existing standards of practice and the numerous unwritten modifications thereof born of customary practice of both air carriers and civic parties before the Board proceedings, and in spite of the Board's tolerance of flagrant extra-record procedures in other new route proceedings, the record made in this reopened inquiry cannot wholly excuse the numerous off-the-record activities of American and San Francisco in the nonstop matter. Viewing the nonstop proceeding as a whole, the vice in the activities of American and San Francisco is that each sought the intercession of non-parties to place the strongest kind of case in the Board's hands both on the important procedural question of an early hearing and on the final substantive question of the merits of the issues in the nonstop proceeding.[111] Whether the ambiguities in the Board's pre-existing code of ethics and the belief of American and San Francisco that longstanding practices of litigants before the Board have so legitimatized their activities so as to require a finding that their violations were only technical in nature is not important to a finding that the violations took place. The foregoing factors are only important to a possible moderation of the sanctions which should follow such violations.

111/ As ruled during the hearings in this reopened inquiry, mere attempts at activities which are proscribed by the Board's code of ethics are sufficient to establish a violation thereof.

In the case of American, its questionable practices consisted primarily of inspiring communications by travel agents directly and through Members of Congress, in soliciting Members of Congress to support its application at the time of oral argument before the Board,[112] and lastly -- and perhaps most seriously -- in attempting to influence the decision in the nonstop proceeding through a well-organized and efficient publicity program in the daily press of the Bay area. In the case of San Francisco, the core of its violations rests in its almost complete disregard of the judicial character of the Board's processes and in the City's well-organized and carefully directed "grass roots" campaign for a third nonstop carrier: first, to obtain an early hearing on the nonstop issue and; thereafter, to solicit support for a favorable Board decision. As part of this campaign, San Francisco virtually saturated the Board with direct communications on the need for an expedited hearing on American's application. The City solicited support for its position from almost every important available civic and political quarter in the Bay area. Included in the mass of materials sent directly to the Board by San Francisco were not only the direct communications of its Mayor representing a need for another nonstop service to New York, but his representations were supported by enclosures of resolutions of neighboring municipalities in the Bay area, by endorsements of various civic groups in that region, and by numerous newspaper articles and editorials which were obviously transmitted to the Board for the purpose of swaying the Board's judgment. San Francisco also inspired certain California State officials and various Members of Congress from California to communicate directly with the Board with respect to the nonstop matter.

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[112] In spite of the ruling of the Court of Appeals for the Second Circuit to the contrary in Eastern Air Lines, Inc. v. Civil Aeronautics Board, 271 F.2d 752 (1959), even the submission of oral argument by Congressmen, particularly when solicited by a private party, cannot be squared with sound rules and professional ethics. In view of the fact that these powerful political personages have not participated in the development of the record, advocacy by them can obliterate the appearance of fairness required in such cases. In the above case, the Board submitted a brief to the Court stating in effect that the Board pays no attention to arguments of Congressmen in adjudicatory cases. If that is so, why clutter up the record and use the Board's and its staff's valuable time in entertaining such arguments at all in any form and often acknowledging such arguments when they are presented in written form?

In mitigation of the foregoing activities of American and San Francisco, it is found that similar activities have been followed both by airline and civic parties to Board new route proceedings for many years. Therefore, even if the views of American and San Francisco are found to be erroneous with respect to their off-the-record campaign aimed directly or indirectly at Board action, they were at least views which were held by the two parties and the errors of each were well-known practices which the Board has long been aware of without taking appropriate action to proscribe such activities in numerous other new route proceedings.

Under the circumstances, the worst that can be said about the activities of American and San Francisco in the nonstop matter is that they engaged in offensive extra-record procedures which had more or less become a norm of conduct on the part of certain litigants to important Board new route proceedings. This latter finding is buttressed by the fact that the contents of the communications to the Board in the nonstop case are typical of the contents of communications to the Board in many other new route proceedings. Nor has it been uncommon for Members of Congress and other public officials to communicate directly with the Board with respect to specific applications or issues in numerous other such cases.

Furthermore, the Board has not interpreted its principles of practice as its November 19, 1959, opinion and order suggest they should be. The instances are numerous where the Board has engaged in, or permitted, communications which are entirely inconsistent with this interpretation. If the Board cannot have conferences to discuss the need for hearings on pending applications, how could it have conferred with representatives of Houston in November 1957, about the need for a hearing on Houston-West Coast service - and other Houston service problems - at a time when Houston's petition in Docket 7984 for improved Houston-West Coast service was pending? If the Board or its staff should not receive communications from civic officials urging the holding of hearings, how, in the present case, could the Board have permitted a member of its staff to visit San Francisco in October, 1957, to discuss the New York-San Francisco air service problem with civic officials, travel agents and other persons, and thereafter privately report to the Board the results of his findings? If the Board cannot receive letters from Congressmen urging the holding of hearings on specific issues, how can the Board entertain similar communications from other public officials and from private citizens? If American or San Francisco should not solicit public support for their requests for a hearing, how could the Board condone distribution by Northeast, prior to the time the New York-Florida case was set for hearing, of a pamphlet widely broadcasting the need for a third New York-Florida carrier? And if American's press relations in the nonstop matter must be condemned -- as they presently will be -- how come the Board has not heretofore done more to proscribe attempts at publicity to influence Board action in other cases?[113]

Aside from the numerous off-the-record efforts of San Francisco during the long history of the nonstop case, perhaps the most disturbing aspect of the whole range of extra-record activities during the course of the nonstop proceeding have been American's efforts to employ publicity as a device for furthering its cause in the nonstop matter. Whatever has been the prevailing custom of other air carriers in thoroughly publicizing their new route cases at almost every turn of such proceedings, the practices of American in the nonstop matter can hardly be harmonized with accepted judicial standards, as gleaned from the Canons of Professional Ethics of the American Bar Association. Thus, Canon 26 makes all canons applicable to regulatory proceedings and Canon 20 specifically forbids the use of publicity with respect to pending or anticipated litigation except in extreme cases. Canon 20 in full reads as follows:

> "20. Newspaper Discussion of Pending Litigation. Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement."

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[113] Similarly, if Trans World Airlines and United are right that the close collaboration of American and San Francisco in their pre-case activities and hearing presentations was evil, how come the regular and frequent consultations between the Bureau of Enforcement of the Board and TWA and United, without notice to either American or San Francisco, both during the pre-trial and trial stages of this reopened inquiry suddenly became proper?

In no sense does this stricture pose an illegal restraint upon freedom of speech or of the press. These freedoms do not protect every use or abuse of the spoken or written word. All authorities are agreed that those freedoms must be balanced against a litigant's right to a fair trial. See, e.g., Lois G. Forer, A Free Press and a Fair Trial, 39 American Bar Association Journal No. 9, p. 800 (September 1953); Hon. Florence E. Allen, Fair Trial and Free Press, No Fundamental Clash Between the Two, 41 American Bar Association Journal No. 10, p. 897 (October 1955); Shepherd v. Florida, 341 U. S. 50 (1951), concurring opinion of Justices Jackson and Frankfurter at pp. 50-55; and Bridges v. California, 314 U. S. 252 (1941).[114]

American contends in part that its use of publicity in this case is justified by analogy to the press releases issued by the Attorney General in anti-trust proceedings. A published opinion of the American Bar Association's Committee on Legal Ethics, issued soon after the press release practice was adopted by the Attorney General, lays at rest any such claim (Opinion No. 199, 26 American Bar Association Journal No. 3, pp. 233-234 (March, 1940)). It states in part:

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[114] Although the last case cited above reversed a conviction for contempt of court of Harry Bridges, based in part on his publicizing a telegram he sent to the Secretary of Labor containing comments on a pending case, the result (by a 5-4 decision) proceeds on the ground that the particular comment, made after trial but while a motion for new trial was pending, did not pose such a clear and present danger to the administration of justice as to justify resort to summary contempt powers. (But see strong dissent of Justice Frankfurter, concurred in by Chief Justice Stone and Justices Roberts and Byrnes). The majority opinion states the general rule as follows (at p. 271):

> "The very word 'trial' connotes decision on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."

> ". . . the Attorney General is attorney for the body politic . . . Herein lies a material difference between a report or a press release issued by the Attorney General, and one given out by an attorney for a private client. Notwithstanding this difference, certain limitations should be regarded in giving out press releases by the Attorney General respecting pending or prospective litigation in order that the rights of the defendants, both in civil and criminal prosecutions, be neither impaired nor prejudiced.
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> "While we may doubt that the effect of public opinion would sway or bias the judgment of the trial judge in an equity proceeding, the defendant should not be called upon to run that risk, and the trial court should not have his task made more difficult by any dissemination of statements to the public that would be calculated to create a public demand for a particular judgment in a prospective or pending case.
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> ". . . when, as here, the statements relate to prospective or pending criminal or civil proceedings, they should omit any assertions of fact likely to create an adverse attitude in the public mind respecting the alleged actions of the defendants . . ." 115/

American also produced evidence to show that American and other carriers have distributed press releases in judicial and other quasi-judicial proceedings. Whatever the propriety of those activities (and that is not in issue here) the

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115/ The force of the last two paragraphs from Opinion No. 199 quoted above may be contrasted with Barbour's activities in providing "memoranda to editors" and other handouts claiming "discrimination" against and inadequate service at San Francisco and even purporting to analyze for the press TWA's and United's exhibits in the proceeding.

whole problem of the uses of publicity in new route cases is deeply troublesome and one that must be faced up to in this reopened inquiry. Assuming arguendo that a carrier may publicize newsworthy matter, even though it comes to light simultaneously in a quasi-judicial proceeding, it cannot be concluded that all bans are removed and that the partisan "memoranda to the editors" and similar matters in this record become an acceptable publicity device in a new route proceeding.

The Board's principles of practice specifically prohibit any interested person from giving directly or indirectly statements to the press or radio by paid advertisements or otherwise designed to influence the Board's judgment in the case. Here again, it may be reasonably held that this prohibition applies only to statements issued during an on-the-record proceeding and is not applicable to the press releases and memoranda circulated by American prior to January 13, 1958. However, American circulated a wide variety of material after the activation of the nonstop proceeding bearing directly on the merits of the issues involved in the case. While the materials circulated by American to the daily press after January 13, 1958, were similar to statements traditionally issued to the press by litigants in Board proceedings, the fact that American's publicity program was generally in accordance with accepted practice in the airline industry does not make that program a proper one. Efforts of litigants before the Board which seek a trial of cases in the public press must be condemned as unwarranted interference with the processes of fair adjudication. It is high time that the Board and the practitioners before it took some affirmative action to curb this practice.

American's intimation that a finding condemning the carrier's press relations in the nonstop proceeding may amount to a "gag" rule prohibiting the issuance of appropriate information to the press is ridiculous. American's press releases and memoranda to the editors reflected the carrier's point of view in a colored and partisan way. While there is no showing in the record that the Board was aware of American's efforts at propagandizing the Bay area press or that the Board even read the numerous articles and editorials of certain San Francisco newspapers which carefully parrotted the carrier's insistent drumbeating on the need for a third nonstop carrier, a finding to the effect that the Board might have been swayed by the publicity efforts of American is not necessary to a condemnation of the carrier's practice in this regard. It is not really vitally important whether the Board was actually influenced by the carrier's careful efforts to propagandize its position with the public in the Bay area. The important thing is that the proceeding before the Board must give the appearance of affording justice to each of the parties involved. As the Supreme Court has observed "justice must satisfy the appearance of justice." Offut v. United States 348 U.S. 11, 14 (1954). In other words, by allowing parties in its new route proceedings to propagandize the Board through the medium of planted newspaper publicity, the Board's dignity and respect and judicial status is undermined regardless of the fact that parties to a case may nevertheless be given a fair hearing.

Enforcement of Canon 20 of the Canons of Professional Ethics and the Board's own rule against newspaper publicity designed to influence Board action is not a denial of the right of the press to seek and have information regarding Board proceedings. The press and other communications media have at all times access to the pleadings and evidentiary materials upon which Board decisions are based. If the press is really interested in what is going on in a particular proceeding, it can check the information wanted on its own. If news and editorial writers lack the intelligence and industry to search and write about momentous issues anticipated or pending before a judicial tribunal with care and independence, a newspaper would better serve the cause of responsible journalism by standing mute on such matters. It is the acceptance by the press of partisan, self-laudatory and often erroenous releases by litigants which constitutes a threat to the fair administration of justice.

The publicity procedures in the nonstop proceeding are particularly disturbing because the Mayor of San Francisco and certain Members of Congress took it upon themselves to relay to the Board articles and editorials in the Bay area press inspired by American. It is true that American was not shown to be directly responsible for those transmittals, but what was most unprofessional concerning American's press activities was the fact that an officer of the carrier trained in the law specifically intended that the impact of certain of the carrier's publicity efforts would somehow reach the Board and Members of Congress. Certainly this officer of the carrier did not want such publicity in the Board's hands in order that the Members of the Board or its staff would have a mere exercise in the reading of newspaper articles and editorials. In view of the foregoing, it is concluded that American and San Francisco both transgressed the Board's ethical standards with respect to the use of newspaper publicity during the pendency of the nonstop matter. However, since what American and San Francisco did in this regard has to a substantial extent been a long established practice of both air carrier and civic litigants before the Board, the offenses of the carrier and the City against the Board's rules in this respect are mitigated by the Board's failure to enforce its longstanding rule against improper newspaper publicity in other Board proceedings.

We next come to the problem of whether the violations of American and San Francisco of the Board's principles of practice as set forth in the foregoing ultimate findings require a retrial of the San Francisco-New York nonstop proceeding.

The mere fact that there may have been some violations of the Board's code of ethics does not necessarily vitiate the prior proceeding. For that to be the case the violations must be shown to have been both substantial and prejudicial. *Sangamon Valley Television Corp.* v. *Federal Communications Commission*, 269 F.2d 211, 224-225, (D.C. Cir., 1959).[116] The courts often set aside administrative determinations because of adjective rather than substantive error. But the procedural irregularities complained of in such situations must be serious and prejudicial. Most frequently, such reversals involved patent deficiencies in the hearing or decisional processes of the regulatory tribunal.[117]

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[116] The significant recent court cases on this question do not stand for a contrary rule. In each of the following, the failure to conform with the rules resulted in manifest prejudice: Service v. Dulles, 354 U.S. 363, 387-388 (1957), dismissal of Federal employee contrary to regulations; Jefferson Amusement Co. v. Federal Communications Commission, 96 App. D.C. 375, 377, 226 F.2d 227, 279-280 (1955), dismissal of application without hearing; Accardi v. Shaughnessy, 347 U.S. 260, 266-267 (1954), decision of Immigration Board ordering deportation of petitioner influenced by the Attorney General; American Broadcasting Co. v. Federal Communications Commission, 85 App. D.C. 343, 349, 179 F.2d 437, 443 (1949), modification of license without hearing; and United States v. Perkins, 79 F.2d 533, 534 (2d Cir. 1935), decision by an Examiner who had not sat on the case.

TWA has never really demonstrated how it was prejudiced by the activities of American and San Francisco except to state that the numerous ex parte communications which came to the Board were somehow inherently prejudicial because TWA had no opportunity to rebut them, and that, moreover, the activities of American and San Francisco as well as the communications inspired by them destroyed the appearance of that degree of fairness in the nonstop case which is required of all judicial and quasi-judicial proceedings.

United argues that the numerous off-the-record communications to the Board led the Board to hold a hearing before actual jet operations were available. This argument has in effect been disposed of by the Court. United Air Lines, Inc. v. Civil Aeronautics Board, 281 F.2d, 53, 55-56 (D.C. Cir. 1960) Moreover, United contends that the only effective remedy which can be directed as a result of this reopened inquiry to vindicate the integrity of the Board, its regulations and its processes, and the rights of the parties other than United and San Francisco in this proceeding, is a vitiation of the nonstop proceeding and a hearing de novo to determine whether the public convenience and necessity require that a third nonstop carrier be authorized between San Francisco and New York and, if so, which of any applicants for such authority should be authorized.

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[117] See, e.g., Morgan v. United States, 304 U.S. 1, 23-26 (1938); Channel 16 of Rhode Island v. Federal Communications Commission, 229 F.2d, 520, 524 (D.C Cir. 1956).

With respect to the many extra-record communications received by the Board during the course of the nonstop case, the majority of such communications in the public correspondence file are dated between the filing of American's motion of May 3, 1957, and the Board's order of June 26, 1957, denying that motion. Quite aside from the fact that TWA and United knew full well that the Board was receiving communications from Congress and civic groups during this period, the Board denied American's motion as TWA and United had asked it to do, so they were scarcely prejudiced by such communications.

As for the conference of the Board with San Francisco on December 2, 1957, and the scattering of communications after the order which denied American's motion for an early hearing, and prior to January 13, 1958, when the Board, on its own motion, ordered a hearing on the nonstop issue, the conference and the extra-record communications in question were almost wholly directed to the question of whether or not there should be a hearing and were not prejudicial. TWA and United were not injured by the fact that the Board finally decided to hold a hearing after its staff had submitted a study of the San Francisco-New York air service pattern, for the mere fact that the hearing was ordered did not assure that a third nonstop carrier would be authorized. Nor can there be any really serious grounds for finding that the conference or the 1957 communications - most of which antedated the Board's final decision by more than two years - in any way affected the capacity of the Examiner and the Board to make a fair and honest disposition of the nonstop proceeding. Indeed, after the pre-case conference fiasco on the part of San Francisco on the alleged necessity of "pressure" upon the

Board as reported in the press prior to the conference, the Board became very skittish in dealing with the City on the nonstop matter. Significantly, two Members of the Board voted against the authorization of a third nonstop in the San Francisco-New York market. Although the dissent of those Board Members does not show that the tactics of San Francisco drove them to vote for a denial of the proposed third nonstop route, no one in a position of judicial responsibility could possibly take kindly to the constant barrage of communications sent or inspired by San Francisco and to the editorial abuse heaped upon the Board by the Bay area press.

Let there be no mistake about the consequences of a decision withdrawing the certificate award to American in this reopened proceeding. If in fact the receipt and retention by the Board of the numerous ex parte communications are disqualifying of American from retaining the third nonstop award, then every important completed licensing proceeding before the Board in recent years has been improperly litigated and should be reopened and perhaps reversed. Further, if the conference of December 2, 1957, between the representatives of San Francisco and the Board is disqualifying of American in the present situation, then the pending Southern Transcontinental Service Case, Docket 7984, and the pending United-Capital Merger Proceeding, Docket 11699, must each be halted in their tracks and reopened. Similarly, if the various activities of American and San Francisco with respect to the solicitation of support in the nonstop proceeding is held disqualifying, the Board and the Court must in all fairness and justice order the reopening of numerous now closed route proceedings before the Board in which similar activities were followed.

No judge, however saintly, capable and wise, can isolate himself entirely from the society in which he lives and insulate himself from all off-the-record matters affecting the delicate task of decision which find their way to him through the press, through social contacts and via his own predelections. Even if an agency enters upon a hearing with some advance preconception of the merits, there can be no objection as long as the agency is intellectually honest and affords a full hearing. So it has been authoritatively determined in circumstances where advance "prejudice" was much more real than anything suggested here. Federal Trade Commission v. Cement Institute, 333 U.S. 683, 700-701 (1948); United States v. Morgan, 313 U.S. 809, 420-421 (1941). Cf. Phillips v. Securities and Exchange Commission, 153 F.2d 27, 32 (2d Cir. 1946), cert. denied, 328 U.S. 860 (ex parte discussion leading to development of an agency view on a key issue prior to hearing held not to vitiate subsequent decision after full hearing); and in Re American & Foreign Power Co., 80 F. Supp. 514, 525 (S.D. Me. 1948). It is not contended that the men who decided the nonstop case were not intellectually honest; any such contention has been expressly disclaimed.

It is difficult to see how United and TWA even can seriously claim that they were prejudiced or denied a fair hearing by the thin trickle of communications received by the Board during the 19 months that the case was actually in progress. The letters in June, 1958, from the Mayor of San Francisco, and from a few California Congressmen, requesting that the Board adhere to the procedural schedule established in the Examiner's report of prehearing conference were to no avail. The Examiner postponed the hearings in accordance with the request of United..

The letters from California Congressmen in February, 1959, urging expedition of the proceeding had no effect on the future course of the proceeding; there is certainly no suggestion that the Examiner was thereby prodded into speeding his decision. If TWA and United seriously thought that these letters had any such result, they were given every opportunity in this proceeding to adduce testimony to this effect; indeed, they were openly invited in this reopened inquiry to do so.

The only remaining communications of substantial significance are the statements submitted by public officials at the time of oral argument. Even were the Board to reverse its traditional position and find that these violated its Rules, there was still no substantial harm to TWA or United. Counsel for the two carriers heard the Chairman refer to some of these communications at the opening of the argument, but they did not object to the receipt of these communications nor did they ask to see them. They saw a Congressman hand the Chairman other of these communications, and still there was no complaint by TWA or United or any request that they be permitted to see the communications.

Finally, as to all the communications, any possibility of prejudice or denial of a fair hearing is put to rest by the Board's affirmative finding in its order of November 19, 1959, that it did not consider the communications in reaching its decision. Similar disclaimers have been accepted even where the extra-record communications set forth facts not of record which would bear critically on the issues in the case. See, e.g., Eastern Air Lines, Inc. v. Civil Aeronautics Board, 271 F.2d 752, 758 (2d Cir. 1959).

Cf. Sisto v. Civil Aeronautics Board, 86 App. D.C. 31, 35-36, 179 F.2d 47, 51-52 (1949). Here the communications did not set forth any significant facts which were not in the record, and were in the main the usual expressions of public interest from Members of Congress, from civic groups and from private citizens.

Perhaps the most important feature of the various off-the-record communications in the files of the nonstop proceeding as well as in the files of every other major record proceeding before the Board is the simple fact that such communications have for very obvious reasons positively no status in the decisional processes of the Examiners and the Board. Faced for years with the difficult problem of what to do with off-the-record expressions of interest, the Examiners and the Board have long caused such communications to be placed in the correspondence file of the dockets involved. These various so-called ex parte or extra-record communications are important and significant largely because of the nuisance and the trouble such communications cause the Examiners and the Board. If my experience as an Examiner in this matter is any guide, absolutely no attention is paid to such communications in rendering a decision on the record.118/

For example, two very important recent licensing cases will illustrate the status of ex parte or extra-record communications received from nonparties to Board proceedings. Thus, it was my responsibility to handle both

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118/ As a matter of sound judicial procedure, the fact that off-the-record communications are uniformly disregarded in the decisional process by the Examiners and the Board does not, of course, make such communications any less improper than they would be if they were considered.

the New York-Mexico City Nonstop Case, Docket 2909, and the Southern Transcontinental Service Case, Docket 7984. The correspondence docket in Docket 2909 contains numerous ex parte communications which I had never seen until I began checking the Board's files in connection with this reopened inquiry to see what has been happening in other proceedings. Similarly, in Docket 7984, various such written communications came to me as the Examiner in the matter - a number of them pleadings for a particular decision on the merits - and, I frankly, could not have cared less what any of those communicants had to say. As it has always been my practice, such communications were shunted posthaste to the Docket Section of the Board for filing in the public correspondence file. Perhaps if the private communicants knew what short shrift is made of such letter writing, they [119] would save time, stationery and postage by forgetting about such activity.

In view of all that has been shown as to the Board's past interpretation of its regulations, and as to accepted and normal practices in other proceedings, it would be harsh indeed to hold that American is disqualified from retaining the nonstop right conferred by the Board's decision or to hold that its qualifications are in some way seriously impaired. The worst of offenses of American, i.e., solicitation of support and the use of publicity, - and the worst offenses of San Francisco, i.e., the constant badgering of the Board through ex parte letters, accompanied in some cases with various enclosures, the solicitation of support and the attempts at Congressional pressure -- each represent activities which in one way or another have for years been a blot on the judicial processes of the Board.

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[119] The voluminous off-the-record correspondence in Board new route proceedings point up to the time and money that is wasted at the Board in the handling and answering of such communications. For example, the correspondenc file in the Great Lakes-Southeast Service Case, Docket 2396, consists of three fat volumes running in excess of a total of 500 direct communications to the Board, acknowledgments thereto and related materials. Interspersed among the mass of correspondence are of course many legitimate inquiries, notifications and other proper messages. But who can guage how many man hours in Board personnel time and taxpayers' money were wasted in that proceeding by the reading of the numerous ex parte communications on the merits of both adjectiv and substantive issues which as a matter of Board policy were uniformly disregarded in the decisional process of that case?

American is a highly respected carrier in the industry and the record of its representation in prior Board proceedings has been as good as that of any of the other certificated air carriers. The carrier's responsibility for that portion of the correspondence file reflecting communications it inspired in the nonstop case is serious. But the consequences of these transgressions of the principles of practice must be mitigated by the fact that this is the general way in which air carriers have been trying large new route cases before the Board for years and by the further fact that the Board has held that solicitations of support of the type inspired by American were not improper. This is not to say that two or more wrongs make a right. But the ends of justice are not served by singling out one carrier for condemnation when equally opprobrious conduct on the part of others similarly situated is excused or ignored. No amount of righteous indignation on the part of TWA and United in this case can gainsay the normal practices of the industry with respect to Congressional contacts, solicitations of support from non-parties and the use of publicity to advance a carrier's cause in new route proceedings.

As already found, the circumstances of this reopened inquiry are in sharp contrast to the Federal Communications Commission cases in which the Commission has found that the activities of applicants in the WKAT and WHDH proceedings reflected adversely on their qualifications. In both of those cases, the Commission found evidence of private, clandestine attempts to influence the judgment of the Commission during a pending proceeding. In both cases it is clear that the applicants were consciously engaged in improper activities, and there had been great prejudice to other applicants. This reopened inquiry has failed to produce any improper demand - much less the slightest claim - by either American or San Francisco upon the conscience and judgment of any staff of Board Member in connection with any phase of the nonstop matter.

Furthermore, the F.C.C. cases would be dubious precedent for this reopened inquiry even if the same types of activity on the part of the applicants were involved, which definitely is not the case. In the F.C.C. cases the Commission faces the problem of determining the comparative qualifications of new and untried applicants, and the question of attempted impropriety on the part of an applicant bears importantly on that judgment because the successful applicant is to be trusted with a license to transmit pictures and words into the privacy of the home without prior censorship and with very little regulatory supervision. Moreover, the difference in the qualifications of the applicants for broadcast licenses and of the public service they can be expected to provide, is usually very slim. Hence, the attitude of the applicants toward the Commission and the personal morality of their principles assume a significance they could never have in the airline field.

In any event, in the present case there is no question of any corruption, "back door" contacts with Board Members or conscious misfeasance on the part of American or San Francisco, and the Board is dealing with a situation where the carrier accused of wrongdoing has, as the Board noted in its order denying the TWA and United petitions for reconsideration based on these charges, had a good record over many years of regulatory supervision.

Conclusions

There next follows conclusions which follow from the findings of ultimate facts. On the basis of all of the foregoing findings and all of the evidence of record, the undersigned Examiner makes the following conclusions:

I. It is found and concluded that no party to the original nonstop proceedings under Docket 9214 et al. before the Civil Aeronautics Board violated any of the provisions of Part 302 of the Board's Procedural Regulations, commonly known as the Board's Rules of Practice in Economic Proceedings;

II. It is found and concluded that the Port of New York Authority, the Port of Oakland and the Oakland Chamber of Commerce, and the San Francisco Chamber of Commerce did not at any time during the proceedings under Docket 9214 et al. violate Part 300 of the Board's Procedural Regulations, commonly known as the Principles of Practice of the Civil Aeronautics Board;

III. It is found and concluded that American Airlines, Inc., and the City and County of San Francisco, each individually and on its own, violated the Principles of Practice of the Civil Aeronautics Board, particularly Part 300.2 of the said Principles of Practice;

IV. It is found and concluded that the violations of American and the City and County of San Francisco of the Board's Principles of Practice did not prejudice TWA or United or any other party to the nonstop proceedings under Docket 9214 et al.; that said violations of the Principles of Practice of the Civil Aeronautics Board on the part of American and the City and County of San Francisco did not deny a fair hearing to TWA, United or any other party to the proceedings under Docket 9214 et al.; and that the record in this reopened inquiry fails to provide sufficient reason or justification for voiding or rescinding or setting aside of the order of certification made to American by Order E-14412, dated September 2, 1959, which authorized American to provide a third nonstop service between New York and San Francisco;

V. It is found and concluded that the Civil Aeronautics Board recommend to the United States Court of Appeals for the District of Columbia Circuit that violations of the Board's Principles of Practice on the part of American and San Francisco did not vitiate the nonstop proceedings under Docket 9214 et al. and that said violations on the part of American are not sufficiently grave to warrant disqualification of the carrier as the licensee for the third New York-San Francisco nonstop route;

VI. It is also found and concluded that the Board recommend to the Court that this reopened inquiry be terminated and that the charges brought by TWA and United against American, San Francisco and other parties to the proceedings in Docket 9214 et al.; be dismissed; and

VII. It is further found and concluded that the Civil Aeronautics Board institute new rule-making proceedings to consider additional proposed amendments of a clarifying nature to Part 300, the Board's Rules of Practice in Economic Proceedings, and Part 300, the Board's Principles of Practice.

Edward T. Stodola

Edward T. Stodola
Hearing Examiner

Appendix A
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1959.

No. 15,414

UNITED AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

No. 15,415

SEPTEMBER TERM, 1959.

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

On Petitions for Review of Orders of the Civil Aeronautics Board.

Before: Wilbur K. Miller, Danaher and Bastian, Circuit Judges.

ORDER

These cases came on for hearing on the record from the Civil Aeronautics Board, and were argued by counsel.

On consideration whereof, and for the reasons indicated in our opinion this day filed herein, it is ORDERED by this court:

Appendix A
Page 2 of 2

(1) that these cases are hereby remanded to the Civil Aeronautics Board for the limited purpose of holding a hearing to determine, with all convenient speed, the relevant facts on the question of whether the Board's rules were so violated as to require a setting aside of the order on review;

(2) that all parties to these cases before the Board shall be admitted to participate as parties in the hearing, if they so request, and that any person or persons concerning whom evidence may be received in such hearing, shall, upon request, be permitted to cross-examine and to submit rebuttal testimony;

(3) that the Board is instructed to notify the Attorney General of the United States of the scheduling and pendency of the hearing and the purpose thereof; and to permit him, or his designated representative, if he so moves, to participate in the hearing as amicus curiae;

(4) that on the conclusion of the hearing the Board shall make its findings and report to this court and shall submit therewith to this court a certified transcript of the hearing;

(5) that the *status quo* in these cases shall be maintained pending further order of this court, and this court hereby retains jurisdiction of these cases pending receipt of the findings and final report of the Board pursuant to this order and pending the further order of this court;

(6) that within 60 days from the date of this order the Board shall report to this court its progress in respect of the hearing hereby ordered, with such recommendations to this court as to the Board may seem desirable at that stage of the proceedings; and

(7) that the Clerk forthwith certify to the Board a copy of the opinion this day filed and of this order.

Per Curiam.

Dated: May 19, 1960

RELEVANT STATUTES AND CAB RULES

The pertinent provisions of the Federal Aviation Act are as follows:

Section 401 (a-c, g) (72 Stat. 754, 49 U.S.C. § 1371)

(a) No air carrier shall engage in air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.

Authority to Modify, Suspend, or Revoke

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: PROVIDED, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

Relevant provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, et seq., are:

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Public Information

Sec. 3. (60 Stat. 238, 5 U.S.C. 1002) Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency--

(a) RULES.--Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

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Decisions

Sec. 8. (60 Stat. 242; 5 U.S.C. 1007) In cases in which a hearing is required to be conducted in conformity with section 7--

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(b) SUBMITTALS AND DECISIONS.--Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * * * *

The Principles of Practice of the Civil Aeronautics Board (14 C.F.R. 300, *et seq.*), are:

300.0 APPLICABILITY OF PART.

The principles of practice set out herein to the extent applicable shall govern the relationships between the Board, its staff, and all other persons.

300.1 JUDICIAL STANDARDS OF PRACTICE.

In many respects the functions of the Board are similar to those of a court and parties to cases before it and those who represent such parties are expected to conduct themselves with honor and dignity. By the same token, the members of the Board, and those of its employees who participate with the Board Members in the determination of cases upon a record, are expected to conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff. The standing and effectiveness of the Board are in direct relation to its observance, that of its staff, and the parties and attorneys appearing before it, of the highest standards of judicial and professional ethics.

300.2 HEARING CASES - IMPROPER INFLUENCE.

It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases—

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

(b) It is likewise improper that there be any private communication on the merits of the case to a member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

300.3 CONCISENESS OF PRESENTATION.

Persons practicing before the Board should endeavor to present their cases in concise form avoiding cumulative and repetitious evidence, since the members of the Board participating in the decision of a case, after notice and hearing and upon a record, must familiarize themselves with the evidence in the record and with the arguments made on behalf of the parties orally and in written briefs, and must base their decision solely on the record.

300.4 UNUSUAL HOSPITALITY.

It is particularly improper that persons interested in the business of the Board should provide unusual hospitality to the Board or its staff; nor should such hospitality be accepted.

300.5 ATTORNEY-CLIENT RELATIONSHIP.

Persons practicing or appearing before the Board, whether or not members of the bar, should have due regard for the standards of professional conduct applicable to the lawyer-client relationship and to the relationship between a lawyer and a judicial tribunal.

(a) The nontechnical nature of the Board's procedure calls for special adherence, by practitioners to scrupulous standards of fairness, candor, and consideration for the rights of others in the pleadings filed, evidence submitted, conduct of the hearing, and briefs and arguments made. In appearing for a client, the practitioner thereby vouches on his honor that in his opinion the client's cause is one proper for determination, and in presenting pleadings and offering evidence he represents that the same are not offered for unwarranted delay and that in his opinion the content thereof is not misleading. Nor should he indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations.

(b) A practitioner, moreover, should advise his client to observe the law according to his conscientious belief as to its permissible meaning and should use his best efforts to restrain his client from improprieties in dealing with the Board or its staff. If a client persists in such improprieties, the practitioner should terminate their relationship.

300.6 VIOLATIONS.

The Board may disqualify and deny temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found after hearing by the Board to have engaged in unethical or improper professional conduct. Violation of any of the foregoing principles shall be deemed to be such conduct.

* * * * * * * *

Relevant provisions of the Rules of Practice in Economic Proceedings of the Civil Aeronautics Board (14 C.F.R. 302, *et seq.*), are:

* * * * * * * *

§ 302.14 Participation in hearings by persons not parties. Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned.

* * * * * * * *

§ 302.18 Motions--(a) Generally. An application to the Board or an Examiner for an order or ruling not otherwise specifically provided for in this part shall be by motion. After the assignment of an Examiner to a proceeding, and prior to his recommended decision, or the expiration of the period within which exceptions to his initial decision may be filed, or the certification of the record to the Board, all motions shall be addressed to the Examiner . At all other times motions shall be addressed to the Board. All motions shall be made at an appropriate time depending upon the nature thereof and the relief requested therein.

(b) Form and contents. Unless made during a hearing, motions shall be made in writing in conformity with §§ 302.3 and 302.4 shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon. Motions made during hearings, answers thereto, and rulings thereon, may be made orally on the record unless the Examiner directs otherwise.

[9820]

(c) Answers to motions. Within seven (7) days after a motion is filed, or such other period as the Board or Examiner may fix, any party to the proceeding may file an answer in support of or in opposition to the motion, accompanied by such affidavits or other evidence as it desires to rely upon.

* * * * * * *

§ 302.24(j) Receipt of documents after hearing. No document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the Examiner.

SA 1195

9821

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

REOPENED NEW YORK-SAN FRANCISCO NONSTOP

SERVICE CASE

DOCKET 9214 ET AL.

INITIAL DECISION OF EDWARD T. STODOLA, HEARING EXAMINER

Served: February 20, 1961

ERRATA SHEET

Page	Line	Correction
2	1st line, Paragraph V.	Change "recommended" to "recommend".
26	4th line, 3rd Paragraph	Change "and" to "or".
48	5th line, 3rd Paragraph	Change "or" to "of".
49	4th line, 2nd full Paragraph	Change "were" to "was".
148	5th line from bottom of page	Add "carrier" after "air".
149	2nd line, first Paragraph	Add "been" after "have".
149	8th line, first Paragraph	Change "Congressman" to "Congressmen".
161	6th line, 1st full Paragraph	Add "the" after "to".
184	Last line	Change "principles" to "principals".

Edward T. Stodola

Edward T. Stodola
Hearing Examiner

February 21, 1961.

SA 197

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

REOPENED NEW YORK-SAN FRANCISCO NONSTOP

SERVICE CASE

DOCKET 9214 ET AL.

INITIAL DECISION OF EDWARD T. STODOLA, HEARING EXAMINER

Served: February 20, 1961

Supplemental Errata Sheet

Page	Line	Correction
15	2nd line from bottom of text.	Change "." after "carriers" to ":".
83	4th line from bottom of page	Change "has" to "have".
176	1st word in 8th line of 2nd full paragraph -- or line 19	Change "United" to "American".
184	7th word in next to last line of first paragraph -- line 11	Change "of" to "or".

Edward T. Stodola

Edward T. Stodola
Hearing Examiner

March 9, 1961

SA 199

9823

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

REOPENED NEW YORK-SAN FRANCISCO NONSTOP

SERVICE CASE

DOCKET 9214 ET AL.

INITIAL DECISION OF EDWARD T. STODOLA, HEARING EXAMINER

Served: February 20, 1961

2nd Supplemental Errata Sheet

Page	Line	Correction
86	3rd line from bottom of footnote 63.	Change "January 30, 1958" to "January 30, 1959."
152	Line 23 (last line of text).	Change "non-parties" to "parties."

Edward T. Stodola

Edward T. Stodola
Hearing Examiner

March 15, 1961.

10275

E-18027

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 15th day of February, 1962

In the matter of the REOPENED NEW YORK-SAN FRANCISCO NONSTOP SERVICE CASE	Docket 9214 et al.

OPINION ON REMAND

By BOYD, Chairman:

This is a remanded proceeding ordered by the United States Court of Appeals for the District of Columbia Circuit[1] for the limited purpose of holding a hearing to determine the relevant facts on the question of whether the Board's rules were so violated as to require a setting aside of its order authorizing American Airlines, Inc., to provide nonstop service between New York and San Francisco.[2] The Court ordered that on the conclusion of the hearing the Board make its findings and report to the Court and that the status quo be maintained, with the Court retaining jurisdiction pending receipt of the Board's findings and final report and pending the further order of the Court. The Board accordingly ordered the proceeding reopened, with all prior parties being deemed to be parties except that the Bureau of Enforcement was substituted for Bureau Counsel.[3]

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[1] The order is set forth in Appendix A of the Initial Decision (Tr. 9813-14) and was issued pursuant to the Court's decision in United Air Lines, Inc. v. C.A.B., 281 F. 2d 53 (1960), which otherwise affirmed the Board's order on the merits. (Throughout this opinion "Tr." refers to the certified record, which includes the transcript of the hearing (Tr. 5512-7816), the joint appendix submitted to the Court of Appeals in connection with the review proceeding (Tr. 7817-8851), the exhibits (Tr. 8852-9219), and the Initial Decision (Tr. 9627-9823).)

[2] Order E-14412, September 2, 1959.

In the Board's order of November 19, 1959,[4] which was before the Court when it ordered the remand, the Board denied and dismissed portions of the petitions for reconsideration filed by TWA and United requesting that American's authorization to provide New York-San Francisco nonstop service be set aside on the grounds that American and certain civic parties engaged in ex parte activities which resulted in violations of the Board's Principles of Practice and Rules of Practice. After detailed consideration of the matters before it, the Board came to the conclusion that "A careful review of the charges, with all fairly pleaded allegations construed in favor of petitioners, has failed to reveal any matter which would warrant vitiation of the proceeding, reassessment of American's comparative qualifications, or further investigation."[5]

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[3] Order E-15342, June 7, 1960. The Board subsequently modified the order to provide for the issuance of an Initial Decision by the Examiner containing his findings and conclusions. (Order E-16013, November 10, 1960.)

[4] Order E-14664.

[5] P. 22 (mimeo.).

Further investigation has now been conducted pursuant to the Court's remand. After full public hearings and the receipt of voluminous evidence, the Examiner assigned to the reopened proceeding has issued his Initial Decision in which he reaches essentially the same ultimate conclusions as those previously expressed by the Board. The Examiner found that none of the parties violated the Board's Rules of Practice in Economic Proceedings,[6] but that American and the City and County of San Francisco (hereafter "San Francisco") each individually and on its own violated the Principles of Practice,[7] particularly Section 300.2, in certain respects. The Examiner also found that the violations of the Principles of Practice did not prejudice nor deny a fair hearing to TWA, United, or any other party, and that the record fails to provide sufficient reason or justification for voiding, rescinding, or setting aside the order authorizing American to provide a third nonstop service between New York and San Francisco. The Examiner further concluded that the Board should recommend to the Court that these violations did not vitiate the nonstop proceedings, that the violations on the part of American are not sufficient to warrant disqualification of the carrier as the licensee for the nonstop route, and that the charges brought against American, San Francisco, and other parties be dismissed.[8]

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[6] Part 302 of the Procedural Regulations.
[7] Part 300 of the Procedural Regulations.

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[8] Although the matter was not in issue in the remanded proceeding, the Examiner also concluded that the Board should institute new rulemaking proceedings to consider additional proposed amendments of a clarifying nature to the Rules of Practice and the Principles of Practice. The Examiner's recommendations that prohibited communications should be returned to the sender (I.D. 145-146 (Tr. 9771-2)) and that oral communications should be reduced to writing (I.D. 146 (Tr. 9772)) have been previously considered and rejected by the Board, and we find nothing in this reopened proceeding which would justify a reversal of the Board's previous views on these matters. The specific and mandatory requirement, advocated by the Examiner, for notice and an opportunity for parties to participate in staff or Board meetings in adversary nonhearing situations (I.D. 152-153 (Tr. 9778-9)) would unduly hamper the administrative process, and it does not appear that there is need for such a regulation. Rule 14, substantially in the form described and endorsed by the Examiner (I.D. 122-123, 149-151 (Tr. 9748-9, 9775-7)), has been amended, effective May 17, 1961, pursuant to the Notice of Proposed Rulemaking of December 1, 1960. Further implementation of the "protest" and "memorandum" provisions of Section 401(c) and (g) of the Act, mentioned by the Examiner (I.D. 119-120 (Tr. 9745-6)), has been accomplished by the amendment effective May 17, 1961, providing appropriate changes in Rules 6, 8, and 14 of Part 302. As to the recommendation for regulations providing standards and closely defined procedures governing the order of processing new route proposals (I.D. 124-126 (Tr. 9750-2)), a Notice of Proposed Rulemaking of December 5, 1961, sets forth standards for determining priorities of hearing. The recommendation regarding service of requests for expedition upon all carriers serving a city or serving the cities for which new service is proposed (I.D. 120-121 (Tr. 9746-7)) will be taken under consideration.

The Examiner also has noted that the Board has issued no regulation pertaining to the service and posting of notice of applications for certificates and their amendment. (I.D. 123-124 (Tr. 9749-50).) While there are no such Board regulations currently in effect, the Board has followed a practice for many years of posting copies of applications received on the bulletin board in the Docket Section for one day and they remain on the shelf for an additional day. The Board also publishes a weekly list, distributed to approximately 400 persons, setting forth all applications received, and including not only applications for certificates of convenience and necessity, but all other applications or major amendments thereto. For a period of approximately five years until August 25, 1943, the Board had a regulation requiring service of applications on scheduled carriers, but the regulation was found so burdensome as to be no longer required.

After consideration of the record and the arguments of the parties,[9] we find that we are in agreement with the findings and conclusions of the Examiner with the exceptions hereinafter noted. Accordingly, except as modified herein we adopt as our own the findings, conclusions, and recommendations of the Initial Decision as contained in the excerpts therefrom which are attached hereto as an Appendix.[10]

1. The Examiner's finding and conclusion that none of the parties violated the Rules of Practice have been excepted to by Northwest, TWA,

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[9] Exceptions to the Initial Decision and briefs to the Board have been filed by American, Northwest, TWA, United, San Francisco, and the Bureau of Enforcement, and all have presented oral argument to the Board. In addition, the Port of New York Authority participated in oral argument, although it did not file exceptions or a brief, and the United States, amicus curiae, filed a brief, but filed no exceptions and did not participate in oral argument.

[10] In addition to the modifications and corrections to the Initial Decision reflected in our adoption of excerpts therefrom and in the subsequent discussion in this opinion, we find it should also be corrected in the following respects: (1) with regard to the Examiner's statement that American "officials" made elaborate plans for building up publicity in the Bay Area upon the release of the Initial Decision, with the carrier hoping that the full impact of such publicity would get to the Members of Congress (I.D. 161(Tr. 9787)), the statement should apply to only one American official (see I.D. 70-71, 174 (Tr. 9696-7, 9800)); (2) we also find no support for the Examiner's statement that American's proposal for an expedited hearing on the nonstop issue was informally discussed with representatives of TWA and United as well as American by the Mayor of San Francisco and the P.U.C. Chairman prior to the filing of American's motion on May 3, 1957 (I.D. 26 (Tr. 9652)); (3) in addition, we find Enforcement's exception well taken to the Examiner's failure to find that an American official urged the San Francisco Chamber of Commerce to approve a resolution supporting American's motion to sever and expedite (see I.D. 31 (Tr. 9657), Tr. 9184-93); and (4) finally, we find no evidence in the record to support the statement that "Northwest followed a policy similar to that of American in providing information to the press on the merits of the nonstop issue." (I.D. 67, fn. 53 (Tr. 9693).)

and United. Only TWA, however, has attempted to set forth in its brief the basis for its exceptions. Although the theory upon which the carrier asserts that violations of the Rules occurred is not entirely clear, the contention appears to be based on the premise that any communication to the Board which is not provided for in the Rules of Practice violates the Rules. Therefore, since some communications by nonparties received by the Board before and after institution of the nonstop proceeding on January 13, 1958, find no sanction in the Rules and did not conform to any Rule — particularly Rule 14[11] — they must be deemed in violation thereof. Further, since certain of such communications, although not submitted to the Board directly by American or San Francisco, were authored, solicited or inspired by these parties, they must be held responsible for such violations.

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[11] Rule 14, as it existed at all times pertinent to this proceeding provided as follows: "§ 302.14 *Participation in hearings by persons not parties.* Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned."

(The Examiner found that there was no violation of Rule 15(d) respecting service of documents (I.D. 127 (Tr. 9753)), and none of the parties has excepted to the finding.)

This argument overlooks the distinction between documents filed for the formal record, which are considered by the Board in reaching a decision, and informal communications to the Board by nonparties which have no standing as a part of the record and are not considered by the Board in the adjudicatory process.[12] Here, the communications received by the Board which were submitted for the formal record and permitted to become a part thereof conformed to the requirements of Rule 14, as interpreted and applied by the Board. With respect to communications by nonparties not submitted or intended for the formal record, transmitted either before or after activation of the case, no Rule of Practice prohibited their transmission nor prescribed the form in which they should be transmitted or filed. Receipt of such documents by the Board from the public is a routine occurrence. We cannot subscribe to the view that the mere transmission of such communications, without more, results in violations of the Rules of Practice.[13] Moreover, the record is clear that neither

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[12] Thus, in the Board's opinion on November 19, 1959 (Order E-14664), it was stated: "But the Rules of Practice are intended to relate to formal documents submitted for the record, and have not been applied to the public communications which are not treated as having, and have, no status on the record." (P. 20 (mimeo.)).

[13] Nor do we accept the contention of Northwest and TWA that practices followed or permitted outside the Rules are violative of Section 3 of the Administrative Procedure Act and necessarily qualify the provisions of Sections 401(c) and (g), authorizing any interested person to file a protest or memorandum in opposition to or in support of the issuance, alteration, amendment, modification, suspension, or revocation of a certificate. Were it thought appropriate for the Board, pursuant to the Administrative Procedure Act, to publish regulations pertaining to the procedures by which the protest and memorandum provisions were to be exercised, it does not follow that the failure to promulgate such regulation suspended the rights conferred by these provisions of the Federal Aviation Act. The important consideration is that although the right to file a protest or memorandum was in effect at all stages of the nonstop proceeding, such protest or memorandum could not become part of the formal record unless filed in accordance with the requirements of Rule 14.

United nor TWA was in any way prejudiced by any supposed lack of specificity in the handling of informal communications, since all were placed in the correspondence file of the docket in accordance with the Board's long-established practice; they were available for public inspection and did not form part of the record; and they were not considered or relied upon by the Board in reaching its decision.

We conclude, for the reasons set forth above, that the record does not establish that either American or San Francisco violated the Rules of Practice in Economic Proceedings.[14]

2. The real substance of this case relates to asserted violations by both American and San Francisco of the Board's Principles of Practice, which are contained in Part 300 of the Procedural Regulations. Since the effect to be given the evidence of record is dependent on the meaning and interpretation of the Principles, it is necessary to consider initially the pertinent parts of the Principles as they read at all times relevant to this proceeding.

Rule 1 of the Principles provided generally that parties appearing before the Board shall adhere to the highest standards of judicial ethics.

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[14] TWA's exceptions to the Examiner's finding and conclusion that the San Francisco Chamber of Commerce did not violate the Rules appears to be predicated on a belief that Rule 14 did not permit the filing of statements by nonparties after the close of the hearing (Exceptions 12, 28, and 29 (Tr. 9882, 9886-7)). However, the Examiner correctly found that the Board has construed Rule 14, as it existed at all times pertinent to this proceeding, as authorizing such filings. (I.D. 32, 85-86 (Tr. 9882, 9886-7).)

Rule 2 dealt with improper influence in "Hearing Cases,"[15] and on its face raised many problems of interpretation. A basic question was whether by the words "cases to be determined after notice and hearing and upon a record" the Rule proscribed particular conduct only after an application had been set for hearing or whether it also applied to request, such as was involved here, to advance an application for hearing. In addition, no precise guidelines existed for delineating the meaning of the term "private communication" for the purposes of Rule 2(a). Although the scope and application of the Principles have been clarified in these and other respects as the result of recent rule making proceedings,[16] these terms were undefined during the period of the activities here in question.

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[15] Rule 2 of the Principles of Practice during the relevant period provided:

> "HEARING CASES — IMPROPER INFLUENCE: It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases —
> (a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.
> (b) It is likewise improper that there be any private communication on the merits of the case to a member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.
> (c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case."

Despite the lack of precise definition, we believe that a fair reading of the Principles makes their applicability and meaning reasonably ascertainable. After careful consideration of the matter, we find no reason to depart from the view expressed by the Board in the opinion and order of November 19, 1959, to the effect that "Despite the contentions to the contrary, we read Rule 2 to be applicable to the proceedings relating to advancement of American's application on the docket,"[17/] as well as to the subsequent proceedings on the merits of its application.

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[16] The present Rule 2 specifically defines a private communication on the merits and clearly sets forth the applicability of the Principles in point of time.

Rule 2 as it now reads provides in pertinent part:

"It is essential in cases to be determined after notice and hearing and upon a record, or any other cases which the Board by order may designate, that the Board's judicial character be recognized and protected. Therefore, from the time of filing of an application or petition which can be granted by the Board only after notice and hearing, or, in case of other matters, from the time of notice by the Board that such matters shall be determined after notice and hearing and upon a record or that its Principles of Practice shall be applicable thereto:

(a) A written or oral communication on any substantive or procedural issue in the case to a Member of the Board or its staff, or to the examiner in the case other than in compliance with the Board's Rules of Practice by any person, either in private or public life, shall be deemed a private communication on the merits. Such communications, unless otherwise provided for by law or published rule are hereby prohibited. Provided, That this prohibition shall not be deemed to apply to informal complaints filed with the Board or to communications with staff members of the Board who are in the course of preparing a case, or for the purpose of determining whether a complaint shall be docketed, or to the usual informal communications between counsel, including discussions to effectuate a stipulation, or to settlement discussion between parties and the Board's enforcement staff, or investigative activities, or to other communications which are deemed proper in proceedings in the Federal courts. Communications which merely make inquiry as to the status of a proceeding without discussing issues are not considered communications on the merits. Any prohibited communication in writing received by the Board or its staff or the examiner in the case, shall be made public by placing it in the correspondence file of the case which is available for inspection and copying during business hours in the Board's Docket Section, but will not be considered by the Board or the examiner as part of the record for decision."

Rule 2(c) generally prohibits attempts to bring pressure or influence to bear on the Board or to sway its judgment in a case by extra-record activities. The question here is not one of definition but of application to a given situation. The answer to this question necessarily involves the exercise of judgment as to motive and intent, which is to be formed after consideration of all the pertinent facts and circumstances.

3. The bulk of the evidence in the proceeding is directed to the question of possible violations of Rule 2(c) by American,

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[17/] Pp. 8-9 (mimeo.). Certain parties have excepted to the Initial Decision on the theory that the Examiner held Rule 2 to be inapplicable prior to the activation of the nonstop proceeding. However, we construe the Initial Decision as holding only that such an interpretation was reasonable (see I.D. 164, 172 (Tr. 9790, 9798)), and we agree with this finding.

San Francisco, or both, by alleged pressure or influence campaigns. Although the Examiner did not particularize the precise portions of Rule 2 which he considered to have been violated, it is evident that when his findings are considered in their entirety, he found attempts to influence the Board or sway its judgment by both American and San Francisco in a manner proscribed by Rule 2(c). Thus, the Examiner stated that in the case of American "its questionable practices consisted primarily of inspiring communications by travel agents directly and through Members of Congress, in soliciting Members of Congress to support its application at the time of oral argument before the Board, and lastly — and perhaps most seriously — in attempting to influence the decision in the nonstop proceeding through a well-organized and efficient publicity program in the daily press of the Bay area."[18/] In the case of San Francisco, the core of its violations was seen to rest "in its almost complete disregard of the judicial character of the Board's processes and in the City's well-organized and carefully directed 'grass roots' campaign for a third nonstop carrier: first, to obtain an early hearing on the nonstop issue and; thereafter, to solicit support for a favorable Board decision."[19/] The main thrust of his determinations appears to rest in his conclusion that "American and San Francisco both transgressed the Board's ethical standards with respect to the use of newspaper publicity during the pendency of the nonstop matter."[20/]

[18/] I.D. 166 (Tr. 9792).
[19/] Ibid.
[20/] I.D. 175 (Tr. 9801).

The activities of both American and San Francisco, as shown by the evidence, and in the light of the Examiner's findings, will now be separately considered.

4. The record discloses that American put forth aggressive efforts to enlist all available support for an early hearing on its application and that some of its activities continued after activation of the proceeding. We need not recite exhaustively the nature and extent of these efforts, for they are fully detailed in the Initial Decision. Briefly stated, however, American undertook to enlist the support of Members of Congress, civic bodies, travel agents, and the press to secure a favorable Board decision on its motion to expedite hearing of its nonstop application and, to a much lesser extent, to promote favorable disposition of the merits of its application.

American's most intensive effort occurred prior to activation of the case on January 13, 1958, with respect to the carrier's motion for an expedited hearing on the New York-San Francisco portion of its application in Docket 5903.[21] Thus American attempted to gain assistance for its motion through Congressional channels[22] and through Chamber of Commerce resolutions, with a particular point made of having copies sent to California's Senators and Representatives.[23]

21/ I.D. 24-57 (Tr. 9650-9683).

22/ Tr. 5621-2, 5625-6, 5633, 5640, 5644, 5646, 5662-4, 6389-91, 7928, 7929, 8102, 8154, 8168-9, 8171, 8180, 8182-3, 8217; I.D. 28-9 (Tr. 9654-5).

23/ Tr. 5813, 5821, 6675-9, 6975, 6991, 7542, 7909, 7910, 7912-13, 7917, 8116, 8140, 8150, 9077; I.D. 27, 33-4 (Tr. 9653, 9659-60).

In addition, American's employees contacted the Lieutenant Governor of California,[24] a County Director of Aviation,[25] and travel agencies,[26] enlisting their support for its motion, and as a result communications were sent by them either to Congressmen or to the Board endorsing the principle of a third carrier.[27] American's activities after the case was activated consisted in some continuation of its press activities, to be discussed subsequently; in at least three contacts with travel agents, which do not appear to have been clearly restricted to the then wholly proper action of soliciting support for Congressional appearances at oral argument;[28] and in at least one Congressional contact which was evidently not limited to solicitation for oral argument.[29]

In assessing these activities, it must be recognized at the outset that not all solicitation of support is to be characterized as an improper attempt to influence the Board or to sway its judgment. The Board has long recognized that carriers have every right to acquaint the public generally with the facts and merits of their applications and to seek to enlist the assistance of interested segments of the public within the framework of the Board's Rules of Practice. It is essentially the fomentation of efforts by nonparties to influence a condemned by the Principles.

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[24] Tr. 6761-4.

[25] Tr. 7016

[26] Tr. 7045, 7049-50, 7067, 7547-9, 7579-82, 8739, 8741; I.D. 37-40 (Tr. 9663-6).

[27] Tr. 7903, 7905, 8029, 8031, 8065, 8736.

[28] Tr. 6241, 6259-62, 6265; see also Tr. 6107-8, 6119, 6129, 6229, and p. 19, *infra*.

[29] Tr. 7995, 9219; I.D. 76 (Tr. 9702). (The American employee making the contact is unidentified.)

Although many of American's activities directed toward obtaining participation by interested persons before the Board were conducted in the manner contemplated by the Rules of Practice, it is evident that others were not so limited. The evidence shows that during the early stages of American's attempts to have its application for nonstop authority heard, it broadly sought support for its objective without restriction as to the source of the support or manner in which it was to expressed. During this period it appears, as the Examiner found, that ma *ex parte* communications were received by the Board, some of which were actively sought, inspired, or authored by American.[30] The record suppor the conclusion that these activities were designed to educe favorable act on the motion to expedite by means other than formal participation before the Board, and to this extent ran afoul of Rule 2(c).

Although the Examiner made no specific findings of impropriety on this score, we note the part played by American in connection with the informal conference of San Francisco with the Board on December 2, 1957. Such conferences with communities have long been considered a necessary and desirable vehicle for permitting the Board to keep abreast of regulatory problems, so long as they are restricted to a consideration of over-all transportation needs as contrasted to matters at issue in a pending proceeding. In this particular instance, however, the surrounding circumstances indicate that the conference was intended as a means of improperly discussing with the Board the merits of the need for a third nonstop carrier.[31] Although it is clear that the Board did, in fact, restrict the conference to a generalized discussion of San Francisco's transportation problems and that the conference was well publicized and the transcript thereof was made public, the attempt and underlying intent is the gravamen of the objectionable conduct. To this extent, American must share responsibility with San Francisco for the effort. The conference was undertaken at the suggestion of and with the support of American,[32] and both American and San Francisco attributed the ultimate setting down of American's application in no small measure to this effort.[33]

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[30] I.D. 26-29, 33-34, 36-46, 155-156 (Tr. 9652-5, 9659-60, 9662-72, 9781-2)

As noted earlier, the Examiner found that American attempted to influence the Board in the nonstop proceeding through a publicity campaign in the daily press of the Bay area, both before the activation of the case on January 13, 1958, and to some extent thereafter. This campaign, as described in the Initial Decision, was conducted by the issuance of press releases, memoranda to editors, personal contacts with newsmen, and through similar means.

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[31] Tr. 7405-6, 7440, 7458; I.D. 59 (Tr. 9685).
[32] Tr. 6184-88; I.D. 59 (Tr. 9685).
[33] I.D. 61-62 (Tr. 9687-8).

Here again, the question of motivation becomes important, for we perceive there to be no objection from the standpoint of the Board's Principles to an air carrier informing the press and the public, in a factual and objective manner, of its stated position at the various stages of a Board proceeding. The line of demarcation between proper and improper use of publicity is an extremely difficult one to fix, and the result to be reached is dependent largely on the inferences to be drawn from a particular course of conduct. For the most part, American's press releases and memoranda to editors, examined in isolation, were in themselves innocuous in appearance and evinced no objective other than to give information or, at most, secure favorable publicity. However, upon consideration of the evidence as a whole, we are satisfied that the Examiner was reasonably warranted in concluding that American's efforts in this regard went beyond proper purposes, and that, when considered in relation to American's other activities, an intended result was the generation of extra-record influence and pressures on the Board. American's press releases and other public

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34/ I.D. 42-47 (Tr. 9668-73).
35/ I.D. 65-70 (Tr. 9691-6).

statements resulted in at least some press agitation,[36] certain of this matter was forwarded to the Board, and an American official credited the newspapers, among others, with the Board's action of January 13, 1958, activating the proceeding and ordering expedition.[37]

American contends that the standard by which its press activities must be judged is whether such activities present an extremely serious and highly imminent threat to the Board's processes. But this is a standard of criminal contempt,[38] a matter with which we are not concerned here. The applicable standard is that set forth in the Principles of Practice — whether statements to the press are designed to sway the Board's judgment — which is a question of fact. We also reject American's suggestion that the Examiner's finding that its press activities were improper reflects the "view that the Board must be insulated from criticism" or represents an attempt "to curb press criticism." We emphasize that we do not regard the provisions of Rule 2(c) as an instrument for the protection of the Board from criticism, of whatever nature. The Rule is, however, a vehicle for requiring all litigants to observe established principles of basic fairness when engaged in proceedings before this Board, and it is in furtherance of this purpose that the Rule has application here.

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[36] The Initial Decision quotes the body of an American internal memorandum of June 25, 1958, regarding the luncheon given by American officials for, *inter alia*, the publisher of the *Call-Bulletin* and an editorial writer for the *Chronicle* (I.D. 68 (Tr. 9694)), but omitted a marginal notation that attached editorials from the *Call-Bulletin* and the *Examiner*, copies of which were sent to two American officials, "were a direct consequence of the conversation at the luncheon." (Tr. 8987.) These editorials are entitled "CAB Fumbles Again" and "CAB Pokes Along" and criticize postponements of the hearings (see I.D. 69 (Tr. 9689)).

[37] I.D. 62 (Tr. 9688). (Two months prior to the Board's order, American's president, at a luncheon to which members of the press and others were invited, urged San Francisco officials to press their efforts for a hearing on the nonstop matter because "you have to keep hammering * * * if you want to get anywhere.") (I.D. 55-57 (Tr. 9681-3)).

[38] *Bridges* v. *California*, 314 U.S. 252, 263 (1941).

Although we have found that the record supports the Examiner's findings in the respects indicated, we reject his conclusion that the solicitation of Members of Congress by American to support its application at the time of oral argument was in any way "questionable" or involved a violation of the Principles as they then read. Statements by Congressmen, whether written or oral, were interpreted by the Board to be authorized by Rule 14 and were formal statements on the record.[39] In soliciting such statements there would be, therefore, no question of soliciting ex parte extra-record communications, and the propriety of such solicitation has, as noted by the Examiner, been upheld in Eastern Airlines v. Civil Aeronautics Board.[40]

5. Turning to San Francisco's activities with reference to Rule 2(c), we find that, like American, it engaged generally in efforts

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[39] We do not agree that this construction "appears to constitute a violation of Rule 14 as it existed at the time of the nonstop proceeding" (I.D. 133 (Tr. 9759)) or that the practice of permitting Congressmen to participate at oral argument under the last sentence of Rule 14 "has departed from the specific language" of the Rule. (I.D. 114 (Tr. 9740)).

[40] 271 F. 2d 752 (C.A. 2d 1959).

to bring the motion to expedite to the attention of Congressmen[41] and inspired communications from others.[42] Moreover, the record supports the conclusion that these activities were motivated by an intent to sway the Board's judgment,[43] and, as previously set forth, San Francisco intended to utilize the December 2, 1957 conference with the Board for improper purposes.[44]

In addition, unlike American, the evidence shows that on several occasions San Francisco addressed communications directly to the Board, which were not served on interested parties,[45] and which went beyond urging procedural expedition. The letter of the Mayor of San Francisco to the Chairman of the Board of May 23, 1957,[46] was clearly addressed, not solely to its request for an expedited hearing, but also to the merits of the issue of additional nonstop air service to New York. The letter enclosed newspaper editorials and articles supporting San Francisco in its endeavor to obtain additional nonstop service to New York and endorsed American as the third nonstop carrier. A further letter from the Mayor of May 29, 1957,[47] received by the Board on June 4, 1957, also transmitted editorials and news articles, together with resolutions of neighboring municipalities in the Bay Area as "evidence" of Northern California's interest in the matter of additional New York-San Francisco nonstop service. On July 3, 1957, the Mayor wrote identical letters to the Chairman and another Member of the Board.[48] in which he expressed the City's disappointment over the denial of American's motion to sever and expedite its New York-San Francisco application.[49] The letter stated that San Francisco appeared to be accorded "unequal and discriminatory treatment." On July 11, 1957, the Chairman acknowledged the Mayor's letter[50] and stated that to the extent the letter constituted a request for reconsideration of the Board's order it should be filed in conformity with the Rules of Practice, with copies being served on other parties to the case.[51] The Chairman's letter also stated that the Board "does not believe it appropriate to consider an ex parte communication of this type." Finally, we find, contrary to the Examiner,[52] that the Mayor's telegram of June 23, 1958, did not deal entirely with a matter of procedure, since it expressed support for a third nonstop carrier "so that San Francisco and Northern California may receive jet service in

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[41] Tr. 7398, 7481, 8065; I.D. 32-33 (Tr. 9658-9).

[42] Tr. 6727, 7394-5, 7592-3, 8056, 8058, 8063, 8068, 8069, 8129, 8135, 8136, 8184, 9007, 9008.

[43] I.D. 166-167 (Tr. 9792-3); Tr. 7385-7, 7395, 7405, 7458, 8260, 9019, 9119, 9122; see also I.D. 59 (Tr. 9685).

[44] See pp. 15-16, *supra*, and I.D. 166-167 (Tr. 9792-3).

[45] In this connection, it is to be noted that TWA and United, on May 28, and May 27, 1957, respectively, filed answers in opposition to American's motion of May 3, 1957.

[46] I.D. 47-48 (Tr. 9673-4).

[47] I.D. 48-49 (Tr. 9674-5).

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[48] Tr. 8204, 7933

[49] Order E-11493, June 26, 1957.

[50] Tr. 8203.

[51] The City resubmitted the letter and sent copies to American, TWA, United, the Port of New York Authority, and the Port of Oakland (Tr. 8208).

[52] I.D. 128-129 (Tr. 9754-5).

1958."[53] These communications dealt with the merits of the issue of the need for a third nonstop carrier. Since they should have been, but were not served on parties of record, we conclude that in the circumstances existing here they were private communications proscribed by Rule 2(a).[54]

6. The Examiner found and concluded that American and San Francisco "each individually and on its own" violated the Principles of Practice. Enforcement, Northwest, TWA, and United, however, contend that San Francisco did not act independently of American with respect to its activities violating the Principles of Practice, but that each acted in concert and that American is therefore responsible for the violations of San Francisco. In advancing this argument, certain of the parties have compared the situation to that of joint adventurers or joint tort-feasors, making each liable for the wrongdoing of the others.

We agree with the Examiner that there is no factual or legal basis for imputing San Francisco's improper activities to American. While the record discloses that there was close and continuing cooperation and coordination between American and San Francisco, it also shows that neither controlled or dictated the specific action of the other. The theory of joint adventurers has no application, since it is concerned with a relationship arising wholly *ex contractu* and is governed largely by principles analogous to those applicable to partnership and agency.[55] Nor can we find on the basis of the evidence that American and San Francisco entered into a common plan to improperly influence the Board and acted in concert pursuant thereto, so as to make each responsible for the other's actions under principles analogous to those governing liability of joint tort-feasors.[56] On the other hand, as we have previously found, American does share responsibility with San Francisco for the effort to use a conference with the Board for improper purposes. Accordingly, with the exception of American's and San Francisco's actions leading to the conference with the Board of December 2, 1957, we find that the Examiner is correct in finding and concluding that American and San Francisco "each individually and on its own" violated the Principles of Practice.

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[53] Tr. 7939.

[54] TWA has excepted to the Examiner's finding and conclusion that the San Francisco Chamber of Commerce did not violate the Principles. (Tr. 9876-7.) Since the exception is evidently based on the belief that Rule 14 did not permit the filing of statements by nonparties after the close of the hearing, and we have held otherwise (*supra*, p. 8), we find that the exception is not well-taken.

7. Having considered the nature and extent of the violations disclosed by the record, we turn now to the question of whether they are of such character as to vitiate the nonstop proceeding. This determination basically involves consideration of whether American's conduct should be deemed to be disqualifying in an absolute sense and whether, in view of the conduct of both American and San Francisco, a conclusion that the proceeding has been vitiated is essential in order to vindicate the Board's processes. We are convinced, as was the

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[55] 48 C.J.S. 866.

[56] See Thompson v. Johnson, 180 F. 2d 431 (C.A. 5th, 1950); Roberto Hernandez, Inc. v. Arnold Bernstein S., M.B.H., 31 F. Supp. 76 (S.D. N.Y., 1940), revd. on other grounds 116 F. 2d 849, cert. den. 313 U.S. 582

Examiner, that the record clearly demonstrates that the Rules and Principles of Practice have not been "substantially and prejudicially" violated [57/] by either American or San Francisco and that the evidence falls far short of establishing that the order granting the award to American should be set aside.

First. The record establishes that the conduct of American and San Francisco which we have held improper was directed primarily to the procedural question of having the case set down for hearing and expedited pursuant to American's motion of May 3, 1957. Very little of such conduct was engaged in after the case was activated [58/] and after the intervention of other parties. [59/]

Between January 13, 1958, when the Board set down for expedited hearing the nonstop case and September 2, 1959, when the Board issued its opinion and order granting American the nonstop route, the only ex parte communication received by the Board from a party was the telegram of June 23, 1958, from the Mayor of San Francisco. [60/] During this

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[57/] See Sangamon Valley Television Corp. v. United States, 269 F. 2d 221, 224 (C.A.D.C. 1959).

[58/] Of the total communications to the Board in the public correspondence file, only 30% are dated during the 19-month period after activation of the case on January 13, 1958, and prior to the Board's decision of September 2, 1959. (I.D. 103, 154-155, 156, 160 (Tr. 9729, 9780-1, 9782, 9786)). Of course, not all of these are attributable to American and San Francisco and many do not deal with the merits of the case. (See I.D. 63-65, 77-79 (Tr. 9689-91, 9703-5)).

[59/] TWA and United filed petitions for leave to intervene on January 27 and April 10, 1958, respectively, and the petitions were granted on May 7, 1958 (Order E-12463). Northwest filed its application for New York-San Francisco nonstop authority on April 28, 1958.

[60/] Tr. 7939; see also supra, pp. 21-2.

same period, no ex parte communications were received from municipal or county governments, chambers of commerce, or travel agents. Several chambers of commerce did submit statements to the Examiner during this period, but all conformed to Rule 14.[61]

As previously set forth,[62] apart from its press activities, American's improper conduct after the case was activated consisted of a few contacts with travel agents which do not appear to have been clearly restricted to the then proper action of soliciting appearances at oral argument, and in at least one Congressional contact by an American employee which was not limited to solicitation for oral argument. While these improprieties were objectionable, they were essentially of a minor nature and none of them, including the press efforts, represented either an extensive or intensive effort to sway the Board's judgment.

With respect to American's press activities, we have previously stated that there is nothing objectionable in a carrier's informing the press and public of its position at the various stages of a Board proceeding, and that the point at which the line is to be drawn between the proper and the improper is obscure. It is clear that carriers have been given wide latitude in the use of publicity campaigns designed to influence certain kinds of governmental action where the impact on competition is direct and unmistakable.[63] The absence of precise criteria in this area is illustrated by the Examiner's concern with activities of other carriers in other Board proceedings, which he considered to be similar to those now before us.[64] While we concur in the Examiner's finding that American overstepped permissible bounds in this instance, our conclusion is one on which there can be reasonable differences of judgment on this record, particularly in view of the uncertainty surrounding the subject. We also deem significant the fact that the preponderance of American's press activities took place prior to the time the case was set down for hearing and sharply diminished thereafter.[65]

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[61] Tr. 8465-79.

[62] Supra, p. 14.

[63] Eastern Railroad Presidents Conference, et al. v. Noerr Motor Freight, Inc. et al., 365 U.S. 127 (1961), reh. den. 365 U.S. 875 (1961).

Thus it is clearly evident that our findings of violations are dependent in major part on a technical construction of the Principles of Practice so as to make them applicable to activities prior to the time the proceeding was set down for hearing. Although, as we have indicated, we believe that a fair reading of the Principles indicates that they were so applicable, our conclusion in this respect has not been reached without difficulty in view of the ambiguity of the language used.[66] This record provides no basis for holding that the contrary construction placed upon them by American and San Francisco was not arrived at in good faith and was not a reasonable one. Although we have since amended our Principles so as to leave no doubt that the prohibitions against ex parte communications and the like apply to efforts to have an application expedited, as well as to hearings on the merits, we also recognize that there are markedly different views as to when specific strictures on freedom of contact should be imposed.[67]

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[64] Thus the Examiner asserts that "what American and San Francisco did in this regard has to a substantial extent been a long established practice of both air carrier and civic litigants before the Board." (I.D. 175 (Tr. 9801)). While the Board is, of course, aware that carriers utilize publicity in connection with Board proceedings, the record here discloses only the activities of American and San Francisco and not that of other parties in other proceedings. Further, the Examiner has not supported his statement that the Board has failed "to enforce its longstanding rule against improper newspaper publicity in other Board proceedings" (ibid.) and that question is not an issue here.

[65] Only four press releases or memoranda to editors were issued during this period and these were released on June 12, 1958, July 14, 1958, September 5, 1958, and April 20, 1959 (Tr. 9034, 9037, 9062, 9069).

Second. In our opinion, this is clearly not a situation in which improper activity is of such a nature as to vitiate the proceedings. As we have seen, our findings here for the most part are dependent on the construction and application of admittedly unclear proscriptions. There is here no evidence or allegation of venality; no personal misconduct of a Member or the staff; no conscious bias; no wrongdoing on the part of third persons; no covert approaches or clandestine meetings between any party and any staff member, Examiner, or Board Member; and no corrupt tampering with the adjudicatory process of a type condemned by the courts.[68] The essential dissimilarities between this case and others which were fatally affected by improper *ex parte* representations were pointed out in the Board's opinion and order of November 19, 1959,[69] and nothing in the record refutes this evaluation.

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[66] The Examiner found that "similar activities have been followed by airline and civic parties to Board new route proceedings for many years" (I.D. 167 (Tr. 9793)). We agree that an examination of the public correspondence file in several other route proceedings discloses superficially "similar" materials to those contained in the public correspondence file in this proceeding. The difference between the proceedings is that the materials here and the activities concerning them were the subject of searching examination while "similar" materials received in other cases have not undergone such scrutiny as would disclose the activities surrounding them.

[67] "No objection could rightly be made to ex parte presentations at the informal stages, presentations that relate to the need or desirability of new air services. Only at the hearing stage where a choice has to be made as between competing applicants do ex parte presentations become truly harmful." James M. Landis, Report on Regulatory Agencies to the President-Elect, December 1960, at p. 43. See also H.R. 12731, 86th Congress, 2d Session, Sec. 2(3): "The term 'on-the-record proceeding' means any proceeding before an agency in the case of which agency action is required by law or agency rule to be based on the record of an agency hearing, but such term includes such a proceeding only beginning with (A) the time that such proceeding has been noticed for hearing, or (B) such earlier time as the agency may designate as provided in section 6."

Third. We are in full agreement with the Examiner's findings that it has not been established that any of the parties were, in fact, prejudiced or denied a fair hearing as a consequence of the violations of the Principles. The Examiner's treatment of this matter is entirely adequate and needs no further discussion.[70]

TWA argues that even if prejudice is not factually demonstrated, prejudice nonetheless occurs when there is any reasonable possibility that incompetent matter may have influenced the trier of facts or when there is any substantial appearance that this is the case. The authorities relied on by TWA do not support the proposition urged.[71] In any event, the Board previously rejected the suggestion that the activities here in question might conceivably have had some effect upon a Member in arriving at his decision,[72] and there is nothing in this record that would permit any other conclusion.[73]

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[68] *Cf*. *WKAT, Inc. et al*. v. *Federal Communications Commission*, C.A.D.C., July 6, 1961, Nos. 13718 *et al*.

[69] P. 3 (mimeo.).

[70] I.D. 25-26, 156, 175-183 (Tr. 9651, 9782, 9801-9).

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[71] The state court decisions relied on are cases of actual influence through *ex parte* matter and/or instances of the admission of improper evidence, which are not involved here. *United States* v. *Shaughnessy*, 219 F. 2d 77 (C.A. 2, 1954) and *Community Broadcasting Co.* v. *F.C.C.*, 274 F. 2d 753, 759 (C.A.D.C., 1960), also relied on by TWA, have no relevance to the proposition which the carrier advances and in any event are clearly distinguishable on the facts.

[72] Order E-14664, p. 4 (mimeo.).

[73] Certainly the objective facts demonstrate that the extra-record efforts of American and San Francisco did not contribute in any degree to the Board's findings as to the need for a third non-stop carrier or its selection of American. The Board's opinion granting the award to American was predicated on conventional considerations of public convenience and necessity, and the result reached was urged by both the Examiner and the then Bureau of Air Operations. Upon judicial review, the Court of Appeals for the District of Columbia Circuit affirmed that the Board's determination rested on substantial evidence of record. (281 F. 2d at 55-57.) Moreover, virtually all of the informal communications were addressed to the Board rather than a Member thereof, and were of a type that are ordinarily not seen by Board Members and that are handled in routine fashion by placing them in the public correspondence file of the docket, which does not form a part of the record, where they are available to all. Of the communications addressed to Board Members, nearly all were to the then Chairman. That they did not influence his vote in favor of American is self-evident from his dissent.

Fourth. Some of the participants argue that rescission of the award to American is necessary in order to vindicate the Board's processes. The argument appears to be that the Board's normal processes have been subverted by American and San Francisco and that a setting aside of the Board's order will serve the remedial purpose of discouraging such conduct in the future.

We do not agree. Apart from the fact that this is a licensing proceeding and not an enforcement proceeding involving the imposition of a sanction,[74] we think it self-evident that such drastic action is neither justified nor warranted under all the circumstances of this case.

The Board is not dealing here with obvious and aggravated misconduct, undertaken with clearly demonstrated intent. Rather, we are concerned largely with activities which, although purposefully undertaken, are deemed to have been improper under particular standards of ethical conduct that we have found were unclear in major respects. We have previously indicated that understandable uncertainty existed as to the time when Rule 2 was applicable to a proceeding, and apart from the question of applicability in point of time, we recognize that there were substantial problems as to the precise nature of the activities proscribed. By way of illustration, Rule 2(a) proscribed any "private communication on the merits of the case." These words provoked, but did not resolve, the questions of whether communications are "private" even when no confidential treatment is requested and they are routinely made public in the correspondence file and whether communications are "on the merits" where, as in the case of many communications in this proceeding, they related to matters of procedure or routinely transmitted material without comment. Also, the obligations of interested parties with respect to motions to set down an application for hearing and requests for expedition were unclear. At such a stage in the proceeding there were technically no "parties" on whom service of documents was required, and the extent of permissible solicitation of support was in doubt. Equally unclear was the obligation, if any, specifically to qualify solicitation so that nonparty views were to be made known only in accordance with Rule 14 or 15.[75/] These are all factors that can and must be accorded substantial weight in determining whether further action is required on our part.

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[74] See Communications Comm. v. WOKO, 329 U.S. 223, 228 (1946); Mansfield Journal Co. v. Federal Communications Comm., 180 F. 2d 28, 35 (C.A.D.C. 1949); Great Lakes Airlines, Inc., et al. v. Civil Aeronautics Board, Nos. 1505 et al., February 24, 1961, cert. den. 366 U.S. 965, reh. den. 368 U.S. 872.

[75/] The limits of such solicitation are now set forth in new Rule 2(e) which reads:

> "It is improper that any person solicit communications to the Board, or any of its members or its staff, or to the examiner in the case other than proper communications by parties or nonparties permitted under Rules 14 and 15 of the Board's Rules of Practice. Anybody soliciting the support of another person shall call such person's attention to the provisions of Rules 14 and 15."

Nor do we believe that a setting aside of the Board's order is necessary in order to discourage extra-record efforts and comparable improper activities in the future. In the Board's opinion and order on reconsideration, the deficiencies in the Rules of Practice and Principles of Practice were recognized,[76] and they have now been clarified in every respect material to the issues in this proceeding.[77] These amended Rules and Principles, rather than this proceeding, provide the appropriate vehicle for deterring the recurrence of any similar problems.

8. The Bureau of Enforcement, Northwest, and the United States, amicus curiae,[78] take the position that even if the Board should find

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[76] Order E-14664, November 19, 1959, pp. 6-9 (Mimeo.).

[77] With respect to Rule 2(a) as it now reads after amendment, see fn. 16, p. 10. The amended Rule 14 now provides:

"§302.14. Participation in hearing cases by persons not parties.

(a) Requests for expedition. In any case to which the Board's principles of practice, Part 300, are applicable, any interested person, including any State, subdivision thereof, State aviation commission, or other public body, may by motion request expedition of such case or file an answer in support of or in opposition to such motions. Such motions and answers shall be served as provided in §302.8 hereof.

(b) Participation in hearings. Any person, including any State, subdivision thereof, State aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to the Examiner a written statement on the issues involved in the proceeding. Such written statements, or protests or memoranda in opposition or support where permitted by statute, shall be filed and served on all parties prior to the close of the hearing."

[78] The United States filed no exceptions to the Initial Decision, but only a brief to the Board.

that American is not absolutely disqualified, the Board nonetheless is obligated as a matter of law, if it finds any violation of the principles by American, to set aside the award to the carrier and to reevaluate the comparative qualifications of American and Northwest, weighing American's derelictions against it. Apparently, they would have us follow this course irrespective of the conclusions we reach as to the kind, nature, and extent of American's misconduct.

Whatever might be the situation if the Board were confronted with facts showing egregious wrongdoing or patently illegal conduct, that is not this case, and we cannot accept the broad proposition now urged upon us in the circumstances present here. Nor do we read the Court's mandate as compelling any such result. The Board is under a specific directive in this remanded proceeding to consider whether, in the light of the evidence, "* * * the Board's rules were so violated as to require a setting aside of the order on review."[79/] This we have done, and we think it plainly evident from our findings that the rules in question were not, in fact, "so violated."

Moreover, we are of the opinion that American's violations were not sufficiently weighty to require Northwest's selection over American, so that further proceedings looking toward comparative reevaluation of the two carriers would serve no useful purpose. Apart from the fact that, for the reasons previously considered in detail, the violations found are primarily technical in nature and their significance diminished by

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[79/] Order of May 19, 1960, paragraph (1).

ambiguities in the Board's Principles, consideration must also be given to the criteria utilized by the Board in selecting American in the nonstop proceeding. At that time both TWA and United conducted nonstop operations between New York and San Francisco. American had been an active promoter of and participant in New York traffic for the Bay Area for more than twenty years and had been operating a New York-San Francisco one-stop service for over three and one-half years, whereas Northwest had never been certificated to serve San Francisco. Thus American was already providing New York-San Francisco service, and the carrier was selected to provide additional unrestricted nonstop service primarily because of its historic interest in the traffic, the integration of the nonstop service with its existing system, and its existing identity in the market. Selection of Northwest would require it to establish a station at San Francisco and would mean there would be three nonstop carriers and one one-stop carrier in the New York-San Francisco market under circumstances where the Board has found, on the basis of substantial evidence, that "* * * permitting American to provide nonstop in addition to its present one-stop service will amply meet the needs we have found required * * *"[80/] by the public convenience and necessity. Were we to assume that American must be accorded a comparative demerit by reason of the information developed in this reopened proceeding, we nevertheless believe that all the facts and circumstances clearly dictate adherence to its selection.

We have given due consideration to all the exceptions to the Initial Decision filed by the parties and find that, except to the extent previously indicated, they do not alter our decision herein.

[80/] Order E-14412, September 2, 1959, p. 25 (mimeo.).

Accordingly, on the basis of the foregoing and all the facts of record we find:

1. That no party to the proceeding under Docket 9214 et al., violated any of the provisions of Part 302 of the Board's Procedural Regulations, commonly known as the Rules of Practice in Economic Proceedings;

2. That the Port of New York Authority, the Port of Oakland and the Oakland Chamber of Commerce, and the San Francisco Chamber of Commerce did not at any time during the proceedings under Docket 9214 et al., violate Part 300 of the Board's Procedural Regulations, commonly known as the Principles of Practice of the Civil Aeronautics Board;

3. That American Airlines, Inc., violated Rule 2(c) of the Principles of Practice and the City and County of San Francisco violated Rule 2(a) and 2(c) of the Principles of Practice and that in committing such violations each acted individually and on its own, except that both acted in concert with respect to their activities leading to the conference with the Board on December 2, 1957, which violated Rule 2(c);

4. That the violations of the Principles of Practice by American and San Francisco did not result in prejudice or deny a fair hearing to any party or otherwise vitiate the proceeding;

5. That the violations of the Principles of Practice by American were not such as to disqualify that carrier from receiving the award of the New York-San Francisco nonstop route;

6. That the Board's Principles of Practice have not been so violated by American and San Francisco as to require a setting aside of the order granting American the New York-San Francisco nonstop route;

7. That this opinion, containing the Board's findings, conclusions, and recommendations, together with a certified record of the proceedings on remand, be filed with the United States Court of Appeals for the District of Columbia Circuit promptly upon the expiration of the period for filing petitions for reconsideration if no such petitions are filed, or in the event that a petition for reconsideration is filed, promptly upon the disposition thereof.

Gurney, Minetti and Gillilland, Members of the Board, concurred in the above opinion. Member Gillilland also filed the attached separate concurrence. Murphy, Vice Chairman, did not take part in the decision.

(SEAL)

ATTEST:

/s/ Harold R. Sanderson
Secretary

MEMBER GILLILAND, CONCURRING:

I would like to comment further as to the extent nonconformity with the Board's procedural regulations should be considered in determining awards in route cases.

Section 401(d)(1) of the Federal Aviation Act provides in part:

> The Board shall issue a certificate---if it finds that the applicant is fit, willing and able----to conform to---the rules, regulations, and requirements of the Board---.

When this language is restored to its context [1] it becomes apparent that the rules, regulations and requirements referred to are those pertaining to the performance of the transportation applied for. The regulations involved in the case before the Board are those pertaining to the method of conducting proceedings before it. It is contended, nevertheless, that a showing of nonconformity with procedural regulations, though the acts be not wrongs per se, could support an inference of a propensity to violate the operational regulations. It would be necessary to balance such an inference against the great experience of the Board in observing the actual behavior of the carriers in these very respects. Many of the carriers have operated extensive route systems under its constant scrutiny for many years and their dependability and propensities for observing the law and the regulations in the conduct of operations is substantially well known. It may be noted that no attack has been made upon the operational or financial fitness of the successful applicant in this case and no such attack could be supported.

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[1] The full text of section 401(d)(1) is as follows: "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

It is further urged that the Board should pursue a policy of the nature of the clean hands' doctrine and that accordingly disqualification is a proper penalty to impose for nonconformity to the procedural regulations. I am not prepared to express an opinion as to whether there may not be some acts of sufficient gravity to require the imposition of such a penalty; for example, wrongs per se, such as fraud, or such direct interferences with the conduct of proceedings as to preclude adequate consideration of an opponent's case. I do express the view, however, that the policy would be a very dangerous one for general application in route award cases. That the Board's procedural regulations should be observed there can be no doubt, but there is a very real question in my mind if this is a proper way to compel observance.

It is by no means the primary function of the Board to sit as an umpire to determine private controversies. If such were the case disqualification of an unruly party might frequently be appropriate.

The Board's obligation, however, is to the public. This distinction is very important. It is the duty of the Board to carry on proceedings and determine upon awards in the interest of the public.

The statute forbids that they be made otherwise. Therefore, any considerations which may lead to results inconsistent with that interest are to be examined with the greatest caution.

It will be immediately perceived that disqualification of a procedurally unruly but otherwise qualified carrier, which happened to be the sole applicant to perform a badly needed transportation service, might not be consistent with the public interest. It will also be perceived that fear of disqualification is unlikely to discourage the unruliness of an applicant, who competes with another applicant but offers less public benefit, for the probability of success is scant to begin with.

It would be a rare case where the comparative potential benefits to the public offered by competing applicants proved to be in equipoise. In the usual case the new service under consideration will clearly integrate to greater public advantage with the route system of one applicant than with the others. That may be true because of the existing or desired traffic flows, because of lesser economic disturbance to other areas, because of better potentials for economical aircraft, personnel or plant utilization, or for a variety of other reasons. All of these matters reflect in quality and efficiency of service and eventually in the tariffs the public is called upon to pay. Even in the case of an award where the reasons stated is that the successful applicant requires strengthening, it is not the interests of the applicant which have influenced the Board, but the fact that the strengthened carrier will be in a position to provide better public service. In this as in other cases it is the public interest, as viewed by the Board, which controls.

If the penalty of disqualification is to be used to exact compliance with the Board's procedural regulations in the case of a carrier in a position to afford the greatest benefits to the public, the result is that the public interest is endangered and that the public must share any penalty imposed. In the case of a community dependent for growth and development on efficient air transportation this penalty may be severe and it may be permanent. It seems to me that the task of determining how much public benefit should be given up as a result of how much procedural irregularity (in which the members of the public had no part) would, in the great majority if not all cases, be difficult to reconcile with principles of right and justice.

This problem has another facet. The complexity of the great route cases has already reached proportions which tax the limits of examiners and Board alike, and the periods of time required to dispose of them is a matter of increasing public concern. Any addition to their complexity, however minor, is not to be regarded complacently. Nevertheless, issues such as those projected here would be very attractive to applicant carriers with little claim on the merits and, if a precedent should be set, it may be anticipated that they will be introduced in many cases.

Neither the public interest nor the Board's procedural regulations are proper subjects for compromise. In my judgment enforcement of procedural regulations should be by means which will permit neither to be prejudiced, i.e., remedies which will bring down the consequences solely on those who have violated them. Statutory remedies capable of such use appear to be available. Whether they are sufficient should be dealt with by the Congress.

/s/ WHITNEY GILLILLAND

APPENDIX

EXCERPTS FROM THE INITIAL DECISION OF EXAMINER EDWARD T. STODOLA IN THE REOPENED NEW YORK-SAN FRANCISCO NONSTOP SERVICE CASE
DOCKET 9214 ET AL

Introduction

This reopened proceeding arises out of a recent review by the United States Court of Appeals for the District of Columbia Circuit of a decision of the Civil Aeronautics Board in the New York-San Francisco Nonstop Service Case, Docket 9214 et al., in which the Board amended the certificate of public convenience and necessity of American Airlines, Inc. [1] so as to authorize that carrier to operate nonstop airline service between New York/Newark and San Francisco/Oakland.

By Order E-14412, dated September 2, 1959, the Board certificated American to provide nonstop service between New York/Newark and San Francisco/Oakland. Thereafter, by Order E-14664, dated November 19, 1959, the Board denied without further evidentiary hearings certain petitions of Trans World Airlines, Inc. and United Air Lines, Inc. for reconsideration of aforesaid order alleging violations of the Board's Principles of Practice and its Rules of Practice in the prior proceedings before the Board.

On May 19, 1960, the United States Court of Appeals for the District of Columbia Circuit entered an opinion upholding the award to American against various challenges other than the ones relating to the alleged violations of the Board's rules. United Air Lines, Inc., et al. v. Civil Aeronautics Board, 281 F. 2d 53. The Court remanded the case to the Board for the purpose of holding a hearing to determine, with all convenient speed, the relevant facts on the basic issue of whether the Board's rules were so violated as to require the setting aside of the certification order on review. The order of remand is attached hereto as Appendix A.

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[1] After initial identification, the airlines and the other parties involved in this reopened proceeding will sometimes be referred to herein by their commonly used names.

History of the Proceeding

For the convenience and use of the Board and the Court in assessing and determining the meaning and significance of the basic relevant evidentiary facts hereinafter found with respect to the alleged violations of the Board's rules, and at the risk of some later repetition of the salient facts involved in this reopened inquiry, the procedural posture of this matter is presently outlined in chronological order.

January 12, 1953 - May 3, 1957. On January 12, 1953, American filed an application with the Board to amend its certificate for its transcontinental Route 4 by eliminating therefrom an existing restriction which permitted the carrier to serve San Francisco/Oakland only on flights which made stops at Tulsa, Dallas, or points west thereof. Among other things, this limitation of the carrier's certificate prevented nonstop service by American between New York and San Francisco. This application was assigned Docket 5903.

TWA and United have long held certificate authority for nonstop operations between San Francisco and New York. In the Denver Service Case, Docket 1841 et al., the Board consolidated another application of American which sought authority, among other things, to fly nonstop to San Francisco from Chicago and other points east of Chicago. Proposals of several other carriers were also included in this proceeding. The Denver case was decided on November 14, 1955.[2] American was authorized to fly nonstop between Chicago and San Francisco; but the Board denied American's application to the extent it requested the right to provide nonstop service to San Francisco from any point east of Chicago, including, among other points, New York/Newark. On December 30, 1955, American's petition for reconsideration of the Board's decision with respect to the carrier's application in the Denver case was likewise denied.[3]

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[2] Denver Service Case, 22 C.A.B. 1178.

May 3, 1957 - January 13, 1958. On May 3, 1957 American filed with the Board a motion requesting that there be severed out of its 1953 application in Docket 5903 the issue of New York-San Francisco nonstop service and that an expedited hearing be held on this single broad issue. On May 13, 1957, the City and County of San Francisco, through its Public Utilities Commission, filed an answer supporting American's motion of May 3, 1957, for a severance and an expedited hearing on the carrier's application for nonstop service. On May 20, 1957, the Port of New York Authority likewise filed an answer in support of American's motion. Answers in opposition to American's motion were filed by United on May 27, 1957, and by TWA on May 28, 1957.

On June 26, 1957, the Board by Order E-11493 denied American's motion of May 3, 1957; but the Board directed its staff to "review the problems of the air service pattern between San Francisco and New York and report the results of that study to the Board on or about December 1, 1957."[4] On December 2, 1957, representatives of the City and County of San Francisco met with the Board in the Board's regular hearing room and urged a general need for more air service to San Francisco, including a third nonstop service to New York.

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[3] Denver Service Case, 22 C.A.B. 1178, 1304.

[4] The contents of this confidential report and the exact date of its filing in December 1957 are not disclosed by this record.

January 13, 1958 - July 30, 1958. On January 13, 1958, by Order E-12103, the Board, with two members dissenting, activated the New York-San Francisco nonstop proceeding by severing from American's application in Docket 5903 that portion relating to the New York-San Francisco nonstop issue and ordering an expedited hearing thereon. The severed proposal was assigned Docket 9214. TWA and United petitioned for reconsideration. On April 9, 1958, the Board by Order E-12337 denied the United and TWA requests for reconsideration of the order activating the nonstop proceeding with the same two members again dissenting.

The newly activated nonstop proceeding proceeded to prehearing conference held on April 29, 1958. On May 15, 1958, the Board by Order E-12511 consolidated into the proceeding a new application of Northwest Airlines, Inc. for New York-San Francisco nonstop authority. No applications other than those of American and Northwest were involved in the nonstop proceeding.

July 30, 1958 - March 9, 1959. Public hearings were conducted by Examiner Walter W. Bryan of the Board during July 30 - 31, 1958, in San Francisco and during September 9 - 18, 1958, in Washington, D.C. In addition to the two applicants, TWA, United, the City and County of San Francisco, the City of Oakland, the Oakland Chamber of Commerce, and the Port of New York Authority participated as formal parties to the proceeding. The Government was represented in the case through the Bureau of Air Operations of the Civil Aeronautics Board.

Briefs to Examiner Bryan were filed on November 10, 1958, by each of the foregoing formal parties except the City of Oakland. Oakland filed a brief statement in lieu of a brief. In addition, numerous statements were also filed with Examiner Bryan pursuant to Rule 14 of the Board's Rules of Practice in Economic Proceedings on or before the deadline set for the filing of briefs.

On March 9, 1959, Examiner Bryan rendered his Initial Decision which found that the public convenience and necessity required a third nonstop carrier between New York/Newark and San Francisco/Oakland; that American should be authorized to provide such nonstop service; and that the application of Northwest for authority to provide such service should be denied.

March 9, 1959 - September 2, 1959. Following the filing of exceptions to the Examiner's Initial Decision, and briefs to the Board in support thereof, the Board held oral argument on April 29, 1959.

On May 15, 1959, the Board issued a press release announcing that it had voted tentatively to grant American's application with two members dissenting. On September 2, 1959, the Board issued Order E-14412 granting American's application with the same two Board members dissenting.

September 2, 1959 - May 19, 1960. On September 22, 1959, petitions to reconsider and revise Order E-14412 were filed with the Board. Northwest filed a petition for reconsideration for Board Order E-14412; TWA filed a petition for rehearing and reconsideration of the order; and United filed a petition for rehearing, reargument and reconsideration in the same matter.

TWA's petition asked for a vacation of Order E-14412 and a termination of the proceedings or, in the alternative, a reopening with a preliminary hearing and stay of the order. United's petition for rehearing, reargument and reconsideration also asked for a stay of Order E-14412.

Answers to the three petitions for reconsideration were filed by American, the City and County of San Francisco, the San Francisco Chamber of Commerce, and the City of Oakland. TWA and United answered Northwest's petition. Among other counter pleadings filed were answers to United's petition for a stay by American, the City and County of San Francisco, and the San Francisco Chamber of Commerce. The Port of New York Authority filed a motion to strike portions of TWA's and United's petitions and answers thereto were filed by those two carriers.

In their petitions to the Board for reconsideration, TWA and United urged that Order E-14412 was legally defective by virtue of various substantive and procedural errors, included among others, a denial of a fair hearing by reason of ex parte communications made or inspired by American, San Francisco, and the Port of New York Authority and by other efforts of these parties to bring pressure or influence to bear upon the Board. These two petitioners claimed that the ex parte communications and alleged efforts to solicit and inspire pressure resulted in violations of Rule 2(a) and (c) of the Board's Principles of Practice and violation of Rules 18 and 24(j) of the Board's Rules of Practice in Economic Proceedings. Petitioners further claimed that these alleged violations necessitated a vacation of Order E-14412 and a hearing de novo, or in the alternative, a reopening of the proceeding with a preliminary hearing to determine the facts as to the alleged ex parte activities. If the latter course were chosen, the Board was requested to stay the effectiveness of Order E-14412. The petition for reconsideration filed by Northwest, the unsuccessful applicant, did not allege violations of the Board's rules.

Petitions for review and for a stay of Board Order E-14412 were filed with the United States Court of Appeals for the District of Columbia Circuit by United and TWA on October 22, 1959. On October 27, 1959, the Board issued Order E-14586 granting oral argument to determine whether and to what extent the allegations of violations of the Board's rules justified further action in the proceeding and, if so, what action should be taken. The order denied the petitions for reconsideration in all other respects.

On October 30, 1959, the Court of Appeals denied the petitioners' request for a stay of Board Orders E-14412 and E-14586. The Court retained jurisdiction over the petitions for review and authorized the Board to take further proceedings on the alleged violations of its rules pursuant to Order E-14586 and to report to the Court on such action within 20 days. In its order the Court specified that the petitioners could thereafter renew their request for a stay.

Oral argument on the alleged violation of the Board's rules was held by the Board on November 12, 1959. On November 19, 1959, the Board issued Order E-14664 denying and dismissing those portions of the petitions under reconsideration which had been the subject of November 12 oral argument. On the same day the Board reported its action to the Court.

As already noted, on May 19, 1960, the Court rendered an opinion upholding the nonstop route award to American against various attacks other than the ones relating to the violations of the Board's rules. The latter matters were remanded to the Board for further proceedings. On June 7, 1960, the Board issued Order E-15342 reopening the proceeding under Docket 9214 et al. in accordance with the order of remand attached hereto as Appendix A.

The Issues

It is arguable from the language of the opinion of the Court that the Court intended the Board only to ascertain the facts concerning alleged attempts by American to bring improper pressure to bear upon the Board and American's responsibility for the activity of other parties in the manner alleged by United and TWA, as opposed to a broader determination which would involve the nature and scope of the activities of such other parties. However, the Court's order of remand attached hereto as Appendix A is not so limited.

Presumably, after carefully considering the Court's opinion and its order of remand, the Board ordered that the proceeding under Docket 9214 et al. be reopened for the limited purposes of ascertaining the relevant facts and determining (a) whether any party to the Board's proceeding violated the Board's principles of Practice, and if so, (b) whether the Board's Rules were so violated as to require a setting aside of the order of certification authorizing nonstop air service between New York and San Francisco by American.[5]

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[5] Ordering paragraph No. 1 of Order E-15342.

The precise scope of this reopened proceeding was the subject of some controversy when the hearings began. The Board's use of the phrase "any party to the Board's proceeding" as shown in the preceding paragraph would, if literally interpreted, encompass the investigation of each of the formal parties to the original proceeding. But the Court's opinion and its order of remand is plainly not that broad. Moreover, the paragraph above reciting the Board's order limits this reopened inquiry to possible violations of the Board's Principles of Practice. In the light of the history of the original proceeding before review by the Court, it is further clear that in speaking of the "Board's Rules" in its order of remand, the Court had in mind possible violations of both the Board's Principles of Practice and its Rules of Practice in Economic Proceedings.

In the initial session of the evidentiary hearings, the Examiner ruled that this reopened proceeding encompasses the limited purpose of determining whether American or other parties to the original proceeding which supported American's application for the New York-San Francisco nonstop service violated the Board's Rules, including its Principles of Practice, and, if so, whether the Board's Rules were so violated as to require them setting aside the order of certification in Docket 9214 et al. The Department of Justice had no basic disagreement with this ruling on the scope of the proceeding; but it took the technically more narrow position that this reopened inquiry should concern itself with questions as to whether or not American Airlines had been a party to any violations of the Board's rules, either directly or through the City and County of San Francisco and other persons in the San Francisco area.[6]

Attached hereto as Appendix B are the Principles of Practice of the Board and certain provisions of the Rules of Practice in Economic Proceedings relevant to this reopened inquiry. In essence, the pertinent provisions of the Principles of Practice preclude "private" communications on the "merits" in cases "to be determined after notice and hearings" and further declare it to be improper for any person to attempt to bring pressure or influence on the Board in such cases. The Board's Rules of Practice govern the procedural conduct of economic proceedings before the Board whether instituted by order of the Board or by the filing with the Board of an application, complaint, or petition.

The June 7, 1960, order of the Board reopening the nonstop proceeding provided for (a) public hearings before an Examiner of the Board; (b) the filing by the parties of proposed findings and conclusions to the Board on all issues;

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[6] In other words, the Department of Justice would have limited this reopened proceeding to the questions of possible violations of the Board's rules by American, either directly or through persons "in privity" with the carrier. Under the Department's view, violations by a civic party to the original case which had no connection with American and as to which American had no knowledge would be irrelevant to the issues of this reopened proceeding. The Examiner's ruling goes a little farther in that it holds accountable to this inquiry the alleged improper activities of any civic party which supported American's application irrespective of its relationship to American during the course of the proceedings before the Board.

(c) findings of fact by the Examiner; and (d) certification of the entire record to the Board for tentative decision. On September 30, 1960, after the hearings in this reopened matter were completed, TWA filed a motion requesting the Board to direct the Examiner to issue an Initial Decision embodying findings of fact and conclusions on the issues in the reopened proceeding. No party opposed TWA's motion.

By Order E-16013, dated November 10, 1960, the Board granted TWA's motion and modified the original order reopening the proceeding under Docket 9214 et al. by providing for the issuance of an Initial Decision by the Examiner. Among other things, Order E-16013 provides that the proposed findings and conclusions due to be filed on November 21, 1960, would be treated as briefs to the Examiner. After the issuance of the Examiner's Initial Decision containing his findings and conclusions on all matters at issue in the reopened proceeding, the further procedural steps will be governed by the Board's Rules of Practice in Economic Proceedings. In other words, instead of limiting the Examiner's function in this matter to making findings of basic facts, Order E-16013 provides for the normal procedure in economic proceedings of an Examiner's Initial Decision containing findings of basic facts, findings of ultimate facts and conclusions. The Court has retained jurisdiction in this matter and the Board's final decision in this reopened proceeding is subject to review by the Court.

Findings of Basic Facts

Prior to the Board's decision in the Denver proceeding, supra, American's service to San Francisco/Oakland was limited to flights which made stops at

Tulsa, Dallas or points west thereof. Among other things, this prevented nonstop service between New York and San Francisco and imposed a considerable circuity on American's one-stop operations.

Although the Board made substantial changes in American's transcontinental route arrangements in the Denver case in the year 1955, including, among others, a new nonstop service for American between San Francisco/Oakland and Chicago and new one-stop service via Chicago between the Bay area in California and numerous points on American's system east of Chicago,[7] American, as well as San Francisco and Oakland, unsuccessfully sought reconsideration of the Board's decision in that proceeding which denied the carrier nonstop authority between the New York area and the Bay area in California.[8] Recognizing that a greater part of the Bay area New York traffic would very likely move on nonstop flights in the future, American had made vigorous arguments for the nonstop authority.

In its own petition for reconsideration in the Denver proceeding, the carrier also joined San Francisco and Oakland in the contention that the Board's Denver decision discriminated against the two cities in that the Bay area would continue to receive unrestricted transcontinental service to New York from only two carriers, TWA and United, whereas their neighbor city, Los Angeles, enjoyed such service from three carriers: TWA, United, and American. This contention was urged upon the Board in spite of the fact that the

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[7] 22 C.A.B. 1178, 1186-1200.

[8] 22 C.A.B. 1178, 1304-1311.

Los Angeles area was then generating substantially more New York traffic than the Bay area. Implicit in the arguments presented on reconsideration was the further contention that the Bay area's economic strength and strategic location would increase its traffic-generating ability if nonstop service by a third carrier were provided.[9] Moreover, as hereinafter found in more detail, San Francisco became alarmed during the processing of the nonstop proceeding under Docket 9214[10] over its alleged inferior status to Los Angeles with respect to transcontinental service to New York because it was given to understand in various ways that its lack of a third nonstop service might result in the inauguration of service by jet type aircraft out of Los Angeles before such service would begin out of San Francisco. Indeed, the probability of substantially earlier jet service for Los Angeles -- an alleged discrimination against San Francisco which eventually proved to be unfounded -- was very effectively used by American in the early stages of the nonstop proceeding to stir up interest in the Bay area in the carrier's proposal for a third nonstop route to New York.[11]

9/ It is not uncommon for a city to claim discrimination vis-a-vis a neighboring point in either the volume or pattern of service available in Board route proceedings. The right of a city to litigate its relative service or route pattern status is well established. Fort Worth Investigation, Order E-12996, September 23, 1958; Washington-Baltimore Adequacy of Service Investigation, Order E-15162, April 29, 1960; and Southern Transcontinental Service Case, Order E-12861, August 5, 1958. Cf. Greensboro-High Point Air v. Civil Aeronautics Board, 231 F. 2d 517 (D.C. Cir. 1956).

10/ For the sake of brevity, the original proceedings under Docket 9214 will be referred to herein as the "nonstop proceeding."

11/ During the early phases of the nonstop proceeding American was expected to be flying jet aircraft nonstop in transcontinental service before TWA or United would get such equipment into service between the West Coast and New York.

Not long after the Board denied its petition to reconsider the Denver decision on December 30, 1955,[12] American began discussions within the company regarding a possible further proceeding for the removal of the certificate restriction on its transcontinental route which would give it nonstop authority between San Francisco and New York and other cities in the East. The City and County of San Francisco were first contacted by American regarding the problem of a new proceeding on the nonstop matter during the early months of 1956.

The first important post-Denver case meeting of American personnel regarding the nonstop issue took place at the St. Francis Hotel in San Francisco during August 1956. Several of the officers of the airline were in San Francisco during that month in 1956 to help with the company's business in connection with the national political convention held in that city during that month. No persons other than the carrier's personnel were present at this meeting.

Among the carrier's officials present at the San Francisco meeting in August 1956 were Walter H. Johnson, Vice President of Sales, who is no longer with the airline; Charles L. Strickler, an Assistant to the Vice President, based in the Washington Affairs office which was then headed by Morris Shipley, an Assistant Vice President of the carrier; Alfred R. Bone, Jr., Regional Vice President of the airline, based in Los Angeles; Charles H. Startup, who was then District Sales Manager of the carrier in San Francisco; the and Thomas W. Barbour, who was then a Public Relations Representative of the carrier in the Bay area.[13] The St. Francis Hotel discussion, in the words of Mr. Barbour centered generally on what the carrier was "going to do next about removing the restriction." Numerous opinions were expressed at the meeting but no firm plan of action was reached.

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[12] 22 C.A.B. 1178, 1304.

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[13] During August 1956, and from that period through June 1958, Strickler reported to Shipley in the carrier's Washington Affairs office. Strickler's duties during the entire period relevant to this inquiry have been liaison work between the carrier and the Civil Aeronautics Board as well as community affairs activities in all cities served by American. In mid-1958 Shipley was transferred to New York and has been serving the carrier there since that time as an Assistant Vice President in charge of State and community affairs. Shipley's successor as head of the Washington Affairs office was Dwight D. Taylor, who still held the same position at the time of these reopened hearings. Since mid-1958, Strickler had been reporting to Taylor. Taylor assumed the responsibilities of the Washington Affairs office as an Assistant Vice President but became a Vice President of the company in late 1959. Prior to mid-1958, Taylor's principal responsibilities were liaison work with Members of Congress and occasional work with various departments of the Federal Government. After the latter date Taylor's responsibilities broadened and included, among other things, duties with respect to the carrier's regulatory problems in general. The Washington Affairs office reports directly to the carrier's headquarters in New York.

Bone served as Regional Vice President of American in Los Angeles during the years 1956 through 1959 and up to February 1, 1960. His territory then included the Bay area. During the foregoing period Bone reported directly to the carrier's headquarters in New York. Startup served as Regional Sales Manager of the carrier in San Francisco during the year 1956 and up to November 1957. Since the latter date Startup has been an Assistant Vice President of Sales in New York. During his term of service in San Francisco, Startup reported to Bone. Barbour has been in public relations work for American in San Francisco since 1954 and he had been the carrier's Manager of Public Relations in that city during the entire period here under investigation. Barbour reported variously to Bone, the Washington Affairs office and the carrier's headquarters in New York.

On November 2, 1956, Barbour sent a memorandum to Startup which read as follows:

> "The following summary of the new CAA statistics is in startling and incontrovertible support of the contention that San Francisco and Oakland are suffering from discrimination in the denial of additional airline services.
>
> "Maybe we should send it to newspaper editors, editorial writers, local congressmen, public utilities officials, business firms, civic leaders, and any others whose support we may desire.
>
> "Although our program toward elimination of the restriction doesn't start right away, the subject matter is news at the moment, and should be brought to the attention of newsmen before it is too old (probably right after the election). Other efforts, of course, can wait until Spring."

As of the date of the above memorandum, Barbour had no specific plan for implementing his suggestions to Startup. The memorandum was written on the assumption that either San Francisco or the carrier would soon do something about asking for a new proceeding on the nonstop issue. Barbour made this assumption because of the considerable dissatisfaction which then prevailed in the Bay area over the Board's decision in the Denver proceeding. There is nothing in the record to demonstrate that in using the clause "whose support we may desire" in the third paragraph of the above memorandum, Barbour intended in late 1956 any more than "support" for a request to the Board for a new nonstop proceeding.[14]

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[14] Shipley also called attention to the CAA publication showing some decline in commercial aircraft operations at San Francisco in a memorandum to Startup dated November 9, 1956. However, Shipley, who was closer to company policy on such matters than Barbour, was frank in stating the carrier's desire to have San Francisco's support on the merits of its application for a third nonstop. Among other things, Shipley's memorandum to Startup states as follows: "Our basic objective at this time, as you know, is to convince the people that there is good basis on the merits for supporting American specifically rather than just a plea for additional service."

The next meeting of American personnel regarding the nonstop problem took place in Los Angeles on February 4, 1957. The occasion on that date was the dedication of a new American maintenance facility for jet equipment at the Los Angeles International Airport. This second meeting was attended by C.W. Jacob, who for the past eight years has occupied the position of Senior Vice President and Secretary of American; Howard C. Westwood, Counsel for the carrier; Rex Smith, then former Vice President of Public Relations for American; and Messrs. Shipley, Strickler, Bone and Startup. Jacob had been receiving reports in his office throughout the year 1956 that San Francisco was very anxious to move ahead with a proceeding to obtain a third nonstop service to New York.[15]

A firm decision was made by American at the Los Angeles meeting of February 4, 1957, on taking some action to seek relief from the restriction which limited the carrier's flights between San Francisco and New York to a one-stop service. Jacob directed Shipley and Strickler to go to San Francisco at an early date to talk this matter over with the officials of the city and possibly its Chamber of Commerce and other agencies. Beyond asking Shipley and Strickler to find out if San Francisco would initiate action on its own to activate a new nonstop proceeding, Shipley and Strickler received no specific instructions as to whom they were to have discussions with in the Bay area. However, Jacob did authorize Shipley and Strickler to inform San Francisco that American would initiate appropriate action to activate the nonstop proceeding if the City would not. Moreover, Strickler was authorized to offer the officials of San Francisco any available economic data that might help the City in moving ahead on the nonstop issue. Finally, Strickler was authorized by Jacob to do what he could in publicizing the carrier and promoting its interest in the Bay area.

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[15] Jacob at all times relevant herein had supervisory and executive jurisdiction over the Washington Affairs office and its personnel.

Jacob met with the personnel of the carrier's Washington Affairs office, particularly Messrs. Shipley, Taylor, and Strickler, on many other occasions during the years 1957 through 1959. At times, the carrier's lawyers were present at such meetings. For the most part, these meetings took place either in Washington or in the carrier's headquarters in New York. In addition to other regulatory matters involving government agencies, the New York-San Francisco nonstop issue was discussed from time to time.

No specific instructions were given to Shipley, Taylor or Strickler by Jacob with regard to the observance of the Board's Rules prior to the time the nonstop issue was set for formal hearing. After the matter was set for hearing, Jacob felt the nonstop case acquired a "new posture". About that time Jacob cautioned his subordinates in the Washington Affairs office about making sure the Board's Rules were observed. However, Jacob was of the mind that even the latter instructions were not really necessary because the Washington Affairs personnel were experienced and had as much awareness of the Board's Rules as he did. Except for certain minor details, Jacob wholeheartedly approved of the activities engaged in by Messrs. Shipley, Taylor and Strickler during the entire course of the nonstop proceeding.

Jacob received status reports on the progress of the nonstop proceeding from time to time from Shipley, Taylor and Strickler. In the majority of the cases these reports were verbal rather than written.

Pursuant to the instructions from Jacob, both Shipley and Strickler went to San Francisco during the latter part of February 1957. During this visit or soon thereafter these two representatives of the carrier called on George Christopher, the Mayor of the City and County of San Francisco; Joseph W. Martin, Jr., then Chairman of the Public Utilities Commission of the City and County of San Francisco;[16] Dion R. Holm, City Attorney of the City and County of San Francisco; and Frank J. Needles, Deputy City Attorney of the City and County of San Francisco. Needles has long served as Counsel for the City and County in aviation matters.

Following his initial visit in 1957, Shipley made three other trips to San Francisco during that year from his Washington office and three such trips during the year 1958. Shipley made no trips to San Francisco during the year 1959. Inclusive of his February 1957 trip to San Francisco, Strickler made over 30 round trips to that City from his Washington office during the years 1957, 1958 and 1959. Eleven of Mr. Strickler's trips to San Francisco were made in the year 1957; twelve were made during the year 1958; and eight trips were made during the year 1959. Although Shipley and Strickler transacted other company business during their visits to San Francisco, a substantial part of their activities in San Francisco during the years just noted related to publicizing the carrier in that area in general and the pursuit of the carrier's interest in the nonstop proceeding in particular. Taylor made only one trip to San Francisco during the period involved in this inquiry but this journey of Taylor's was concerned with company business other than the nonstop problem.

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[16] The Public Utilities Commission of the City and County of San Francisco hereinafter will be referred to as the "PUC."

The PUC is an official agency of the City and County of San Francisco through which the City and County operates its airport and participates in proceedings before the Civil Aeronautics Board and other regulatory tribunals. The City and County make no important decisions regarding aviation matters except after approval of the PUC. During the February 1957 visit to San Francisco, Shipley and Strickler requested that the City and County of San Francisco file a motion with the Civil Aeronautics Board asking the Board to sever and set down for immediate hearing the San Francisco-New York portion of American's application in Docket 5903. The City and County were also requested at the same time to indicate their preference for American as the third nonstop carrier. The City and County, through Joseph W. Martin, Jr., Chairman of the PUC,rejected both of American's requests. San Francisco was interested in having such a motion filed but it wanted the carrier to file it. As of February, 1957, the City and County were more interested in getting a hearing on the nonstop issue than in the choice of the carrier if a third nonstop route were to be authorized.

Following the rejection by San Francisco of American's request that the City and County file the motion for severance and an expedited hearing, Shipley and Strickler told PUC that the carrier would file such a motion and urged the PUC to support the motion by appropriate answer. In approaching the officials of San Francisco with regard to the motion on their part for the activation of such a proceeding and in supporting American as the preferred carrier for the third nonstop service, Shipley and Strickler were armed with various statistical analyses which, among other things, outlined San Francisco's existing transcontinental services, a comparison of the services of Los Angeles to and from the New York area with similar services provided for the Bay area, the advantages of Los Angeles over San Francisco in the number of schedules to and from the New York area, and the alleged inevitability of the eventual choice of American as the logical third nonstop carrier between the Bay area and the New York area. Moreover, after informing the officials of San Francisco that the carrier would file the motion for severance and an expedited hearing, Shipley and Strickler offered to help San Francisco with the preparation of their answer supporting American's request.[17]

Upon being informed that American would file the motion for severance and an expedited hearing, San Francisco readily agreed to support such a motion. In these circumstances, the carrier on May 3, 1957, filed with the Board a motion requesting that there be severed out of its old 1953 application in

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[17] In addition to Shipley and Strickler, the initial meetings of the carrier with the PUC were attended by Bone of American and General F. B. Butler, Manager of the San Francisco International Airport at that time.

Docket 5903 the issue of New York-San Francisco nonstop service and that an expedited hearing be held on this single issue. At that time American was the only carrier having an application for such service.

Shortly after the filing of American's motion of May 3, 1957, the PUC of the City and County of San Francisco met in formal meeting on May 7, 1957, and voted unanimously by resolution to support American's motion for severance and an expedited hearing. Prior to taking the vote on the matter, the PUC in an open meeting heard representatives of American, TWA and United argue for or against the proposed resolution of PUC which would authorize the City and County of San Francisco to file an answer and motion with the Civil Aeronautics Board in support of American's motion for an immediate hearing on the nonstop portion of American's application in Docket 5903. The same resolution also requested that the Board of Supervisors of the City and County of San Francisco adopt a resolution urging the Board to activate a new proceeding on the nonstop issue. The resolution adopted by the PUC further stated that copies of its resolution be furnished to the Mayor of the City and County of San Francisco, the United States Senators from California, Congressmen from the San Francisco metropolitan area, and all other interested parties, and that they be requested to support San Francisco in urging the Board to set down for immediate hearing that portion of Docket 5903 proposing San Francisco-New York nonstop service.[18]

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[18] The PUC adopted a second resolution on or about May 7, 1957, which requested the San Francisco Chamber of Commerce to endorse the action of the PUC with respect to American's motion and to urge all other Chambers of Commerce in Central and Northern California to participate in San Francisco's efforts to obtain an early hearing on American's nonstop proposal.

Having participated in hearings on the proposed resolution of the PUC supporting American's motion, TWA and United thus acquired knowledge of San Francisco's plan to solicit support for an expedited hearing on the nonstop issue. Moreover, American's proposal for an expedited hearing on the nonstop issue was informally discussed with representatives of TWA and United as well as American by Mayor Christopher of San Francisco and by Chairman Martin of the PUC of the City and County of San Francisco prior to the filing of American's motion on May 3, 1957.

On May 7, 1957, San Francisco, through its PUC, adopted an answer in support of the motion of American.[19/] On May 20, 1957, the Port of New York Authority and the Port of Oakland filed an answer in support of the carrier's motion to sever and expedite. Answers of United and TWA in opposition to the motion of American were filed with the Board on May 27 and 28, 1957, respectively.

The filing of American's motion for severance and expedition on May 3, 1957, and the answers thereto, were followed by a groundswell of activity in behalf of the carrier in Northern California. In addition to numerous persons prominent in either private or public affairs in the Bay area, various civic organizations joined in the demand for an immediate hearing on the nonstop issue. The clamor for such a hearing was fanned by news stories and editorials which began to appear in the press of the Bay area soon after the filing of American's motion.

[19/] The answer of San Francisco was filed with the Board on May 13, 1957.

On May 1, 1957, Strickler sent a memorandum to both Startup and Barbour which read in major part as follows:

> "You probably have already done so but if not may we suggest that, in connection with the press, civic and public relations program we discussed last week, thought be given to the preparation of a complete list of associations, groups, chambers of commerce, newspapers and other publications in San Francisco/Oakland and the surrounding cities and counties that we should call on.
>
> "It would also save time if we knew in advance the person or persons to see in the places of contact. If this can be done we should be in a better position when we sit down next Wednesday to block out our program and make specific assignments to the members of our group."

Copies of the above memorandum were sent to Shipley, Bone and Burck H. Smith. On May 8, 1957, Strickler met with Barbour, Startup and Burck H. Smith in San Francisco to make the contemplated assignments of personal activities of each man in the group.

Strickler assumed the overall charge of the carrier's activities with regard to the nonstop proceeding in the Bay area; Barbour was to continue with his responsibility of getting favorable publicity for the carrier on the nonstop problem; Bone was to contact various business groups in San Francisco on the same question; Startup was requested to contact the chambers or associations of commerce in the outlying cities in the Bay area; and Burck Smith, who was then a Regional Director of State and Community Affairs stationed at Los Angeles, was given a briefing on the carrier's plans with respect to enlisting support for its request for an expedited hearing on the nonstop issue but was not given any specific assignment at that time.[20] A comprehensive file on the important citizens of San Francisco, both in public and private life, was compiled by the carrier's San Francisco office sometime during the first part of May 1957. This list of persons was discussed at the meeting Strickler had with his associates on May 8, 1957. The carrier's San Francisco office also carefully compiled a so-called "clip book," showing the progress of the nonstop proceeding, including, among other things, a record of pertinent news stories and newspaper editorials, the various persons contacted, and the nature of the reaction to American's request for an early hearing on the nonstop issue.

Meanwhile, after the filing of American's motion, Taylor, who was then the carrier's liaison man with the Congress in Washington, visited various offices of Members of Congress from both the California and New York areas to inform them of the carrier's filing. It has long been the carrier's policy to inform Members of Congress of any important new route applications which might affect the constituents of those Members. At this stage of the proceeding, Taylor was of the mind that the filing of the carrier's motion was purely a procedural matter and that it was wholly appropriate for him to advise Members of Congress from the California and New York areas of American's request to the Board for an expedited hearing in the nonstop matter. In several instances Taylor was requested by a Member of Congress to supply a copy of American's motion and answers thereto. Taylor complied with such requests. In the event a Congressman asked Taylor what the Congressman could do to help, Taylor would tell the Congressman to take such steps as the Congressman thought appropriate. Taylor did not think that a letter by the Congressman to the Board at this point in the proceeding would be inappropriate. In almost every instance, the Members of Congress contacted by Taylor after the filing of American's motion wrote letters to the Board during June 1957 in support of the carrier's motion for an expedited hearing. Copies of such letters were not served upon TWA or United.

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[20] A short time after May 8, 1957, meeting Smith contacted the Chamber of Commerce at Sacramento in the interest of American's motion at the suggestion of Strickler. Smith made frequent trips to Sacramento in the course of his regular duties with the airline.

Congressional contacts of the kind just described were then not peculiar to American Airlines. Other air carriers have engaged in similar activities in Congressional offices in the past.

Several of the activities of American and of San Francisco regarding the nonstop problem which followed the filing of American's motion on May 3, 1957, were already in the advanced planning stage at the time the motion was filed. Thus, the prospective action of the PUC on a resolution adopted on May 7, 1957, approving the filing of the answer of San Francisco in support of American's motion, was known to Startup on or before May 6, 1957.[21] Similarly, sometime prior to the filing of American's motion and the adoption of the aforesaid position by the PUC, Needles, Deputy City Attorney of San Francisco, prepared a draft form of a proposed resolution concurring in the action of the PUC for use by the Boards of Supervisors of 13 counties in Northern California, plus the draft of a letter of transmittal in behalf of George Christopher, Mayor of the City and County of San Francisco. The Mayor's letter and the draft of the proposed resolution, both of which were prepared on or about May 2, 1957, were sent by the Mayor to various Boards of Supervisors of the counties in and around the Bay area. As proposed by Mayor Christopher, a number of the counties adopted resolutions through their Boards of Supervisors patterned after the proposed draft which was sent to them by the Mayor of San Francisco and such resolutions were filed with the Civil Aeronautics Board during the months of May and June 1957, either through Mayor Christopher's office or directly to the Board. Mayor Christopher also contacted various Members of Congress from the State of California seeking their cooperation and support for an expedited hearing on the nonstop issue.

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[21] In a memorandum to Jacob dated May 6, 1957, copies of which were sent to Shipley and Bone, Startup called Jacob's attention to an editorial appearing in the San Francisco Chronicle and to another appearing in the San Francisco Call-Bulletin on the same day, both in support of American's motion, and then advised Jacob as follows:

> "Tomorrow (Tuesday, May 7th), the Public Utilities Commission will act on a resolution 'Directing the filing of an answer and motion with the Civil Aeronautics Board supporting the motion of American Airlines to sever and set down for immediate hearing the San Francisco-New York nonstop portion of the application under Docket 5903, the Commission believing that San Francisco is entitled to a third nonstop air service between San Francisco and New York; requesting the Board of Supervisors to adopt a resolution in furtherance of the motion; copies of Commission's resolution to be furnished Honorable Mayor George Christopher, state senators, congressmen from the Bay Area and other interested parties.' "

On May 14, 1957, the Transportation Committee of the San Francisco Chamber of Commerce held a meeting at the invitation of Charles C. Miller, Manager of the Transportation Department of that Chamber, in order to help the Chamber decide whether or not it should support the City and County of San Francisco in accordance with the resolution of its PUC which endorsed the motion of American. The aforesaid Transportation Committee consists of 43 members representing each of the various transport industries in the Bay area, including, among others, the airlines engaged in air service to and from that area. As in the case of civic organizations in other cities in other route proceedings before the Civil Aeronautics Board, the May 14 meeting was sort of a preliminary hearing to aid the Chamber of Commerce in deciding on the course to follow regarding the proposed new nonstop proceeding. Representatives of American, TWA, United and of other carriers were present at the meeting. After presentations by several air carriers both for and against an expedited hearing on the nonstop issue, the Transportation Committee of the San Francisco Chamber of Commerce agreed to support the motion of American and the resolution of the San Francisco PUC for an expedited hearing. The Board of Directors of the San Francisco Chamber of Commerce approved the Committee's recommendation. By a letter dated May 24, 1957, and addressed to the Chairman of the Civil Aeronautics Board, the San Francisco Chamber of Commerce, through the foregoing action of its Board of Directors, expressed support of the efforts of the PUC to obtain an expedited hearing on the nonstop question.[22]

The Chamber of Commerce of San Francisco generally works very closely with City Hall in that City regarding applications for new or additional air service,

and copies of the City's communications to the Civil Aeronautics Board regarding the nonstop proceeding during the May 1957 period were in each case forwarded to Charles C. Miller, Manager of the Transportation Department of the San Francisco Chamber of Commerce. And, following the standard procedure of the Chamber of Commerce in matters of this kind, the Chamber sent copies of its May 24 letter to the two United States Senators then representing the State of California and to certain members of the House of Representatives in Washington representing the Bay area. While copies of the May 24 letter were not served upon TWA or United, the two carriers were aware of the action of the San Francisco Chamber of Commerce endorsing the resolution of the PUC of that City which favored an expedited hearing.[23]

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[22] The above letter was signed by E. D. Maloney, President of the San Francisco Chamber of Commerce, and it was filed with the Civil Aeronautics Board on May 27, 1957. The San Francisco Chamber of Commerce then made clear that its action at that time was limited to the matter of an expedited hearing and was not to be construed as an expression of preference for any particular carrier. The Chamber did request, however, that its letter of May 24, 1957, be made part of the record in Docket 5903.

The San Francisco Chamber of Commerce did not solicit support for American's motion of May 3, 1957, from associations or chambers of commerce in the outlying communities of the Bay area. But, as hereinafter found, the San Francisco Chamber of Commerce did solicit statements supporting a third nonstop service from such organizations after the hearings in the case were completed. This latter activity of the San Francisco Chamber of Commerce was proper and lawful.

In a letter dated May 29, 1957, and filed with the Board on June 3, 1957, Mayor Christopher of San Francisco made extensive comments on the answers filed

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[23] Immediately prior to the favorable action on American's motion taken by the San Francisco Chamber of Commerce, the Mayor of San Francisco sent the Board a letter dated May 21, 1957, with copies of resolutions of numerous municipalities and civic groups in the Bay area taking similar action. The latter letter and its enclosures were received by the Board on May 27, 1957.

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In a letter dated May 29, 1957, and filed with the Board on June 3, 1957, Mayor Christopher of San Francisco made extensive comments on the answers filed by TWA and United to American's motion of May 3, 1957. The Mayor then again requested an immediate hearing on American's proposal for nonstop service. The letter of May 29, 1957, of San Francisco was served on American, TWA, United and the Port of New York Authority. But the letter enclosed a long list of persons or organizations which had already written to the Board regarding the need for an early hearing. In his letter of May 29, 1957, the Mayor called attention to the earlier correspondence to the Board by California State officials, Members of Congress, municipalities and chambers of commerce in the Bay area, and the San Francisco Labor Council.

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On June 3, 1957, Congressman Shelley wrote a letter to Mayor Christopher in which he stated in part as follows:

> "In addition to these matters, I am continuing to work on the CAB to grant a hearing on the American Airlines nonstop San Francisco-New York application."

Copies of Congressman Shelley's letter of June 3, 1957 to the Mayor were sent to four prominent civic leaders in the Bay area.

In addition to contacting various civic leaders in the Bay area, Strickler and Bone decided to contact business groups and the chambers of commerce of the outlying communities in the Bay area. As already noted, responsibility for the latter contacts was placed largely upon Startup and his sales personnel in those communities. These contacts began about mid-May 1957. In accordance with instructions from Strickler and Bone, Startup asked his zone managers and his sales people to get in touch with the various chambers of commerce in the Bay area with the view of asking them to adopt resolutions in support of American's motion for severance and an expedited hearing. These instructions contemplated suggestions to those chambers as to the type of resolution to be proposed and the mailing of such resolution to the Civil Aeronautics Board and to interested Members of Congress from the State of California. Following this activity, there were filed with the Civil Aeronautics Board resolutions by the Chambers of Commerce of Alameda, Burlingame, Hayward, Mill Valley, Richmond and other outlying communities. These resolutions as filed with the Civil Aeronautics Board were in some cases almost identical in form and were either drafted by an employee of American or followed the pattern of a draft furnished the respective chambers of commerce by a representative of the carrier.[24]

Among the civic groups in the Bay area interested in the nonstop matter was the Downtown Association of San Francisco.[25] On May 8, 1957, the Downtown Association through its Board of Directors adopted a resolution urging the need of a third nonstop service to New York and transmitted that resolution to the Civil Aeronautics Board through Mayor Christopher.

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[24] After the filing of the letter of May 24, 1957, of the San Francisco Chamber of Commerce with the Civil Aeronautics Board, the sales representatives of American in some cases used the letter-form of resolution filed by the San Francisco Chamber of Commerce in their approaches to the outlying area chambers of commerce.

[25] The Downtown Association of San Francisco is a nonprofit civic association devoted to the economic development of the City of San Francisco. Its membership encompasses substantially all of the significant business, commercial and financial interests of that City.

The correspondence of the Downtown Association after the adoption of the resolution of May 8, 1957, followed the usual pattern used by this civic organization during the course of many new route cases. Copies of its resolution were sent to Mayor Christopher, Bay area municipalities, Senators Knowland and Kuchel, Congressmen Mailliard and Shelley, as well as to other Congressmen from the State of California. The information available to the Downtown Association regarding the nonstop proceeding was contained in a "memorandum to editors" which had been prepared by Barbour for the daily press of the Bay area and which summarized in considerable detail the history of the nonstop issue, San Francisco position with respect to another nonstop proceeding, the probability of jet service in the San Francisco-New York market, and the position of American in its struggle for a new nonstop proceeding.

Although he had been contacted by Shipley prior to May 3, 1957, the Manager of the Downtown Association, Thomas Gray, took further steps on his own in discussing the nonstop problem with a representative of American after he saw a story in the San Francisco press on the filing of American's motion of May 3, 1957. At about the same date Gray asked Barbour for information on the nonstop problem and Barbour responded by giving Gray the "memorandum to editors" noted above. It was dated April 30, 1957, and received by Gray on May 3, 1957.

The communications of the Downtown Association reviewed above were sent prior to the Board's order granting a hearing in the nonstop case. The Association's resolution of May 8, 1957, however, supported American's candidacy for the third nonstop route, since it urged "the Civil Aeronautics Board to consider and act promptly and favorably on the most recent application of American Airlines." As already stated, the resolution of the Downtown Association of May 8, 1957, was passed by its Board of Directors. Both Gray and President Albert E. Schlesinger of the Association were vague in their testimony as to whether or not there was an informal hearing at which American, TWA and United appeared before the Board of Directors prior to the adoption of the resolution. But the record is clear that some time prior to the adoption of the resolution representatives of American as well as of TWA and United had been in contact with either the officers or directors of the Downtown Association and argued for or against the adoption of the resolution. After the initial resolution supporting a hearing was adopted on May 8, 1957, the Downtown Association was confronted with opposition to the Association's continuing participation in the nonstop proceeding after the Board granted a hearing. Strong opposition to participation by the Association in the hearings on the nonstop issue was voiced to the Board of Directors of the Association by Warren Burke, a representative of United stationed in San Francisco. The very fact that the Association heard Burke on this question and debated the advisability of continuing participation in the nonstop case is evidence of United's power in the business community of the Bay area.

During the period between May 3, 1957, and June 26, 1957, the Board received communications from several travel agents urging an expedited hearing on American's nonstop proposal. In addition to contacting chambers of commerce and various large users of air traffic in the Bay area, American's sales representatives also contacted several ticket agents; but the record is somewhat confused as to whether the carrier asked its sales people to call on travel agents in the Bay area during the early phases of the nonstop matter.

Thus, in the early part of May, 1957, a sales representative of American discussed the proposed nonstop proceeding with one of the co-owners of Andrews Travel Agency in Berkley, California. As a result of this discussion Mr. Andrews of the Andrews Travel Agency wrote a letter dated May 24, 1957, with the heading or salutation "To Whom It May Concern," expressing the hope that favorable consideration would be given to the establishment of another nonstop service between San Francisco and New York. This letter was sent to the Civil Aeronautics Board and received by the Board on June 6, 1957. Copies of the same letter were also sent by Andrews to representatives in Congress from Andrews' district, as well as to the two United States Senators representing the State of California at that time. Another sales representative of American contacted the Contra Costa Travel Service at Concord, California, and after the discussion with that representative, Contra Costa sent a wire, under date of May 15, 1957, to a Member of Congress from Northern California advising the Congressman that the travel agency supported the motion of American Airlines for an early hearing on the nonstop issue, as well as advice to the further effect that the Bay area was entitled to a third nonstop service to New York. In a letter dated May 23, 1957, that Congressman wrote to the Civil Aeronautics Board in which he transmitted the wire of the Contra Costa Travel Service and inquired of the Board what steps could be taken to expedite the nonstop proposal of Docket 5903.

The Congressman's letter was received by the Board on May 24, 1957, and this letter, along with the attached wire of the Contra Costa Travel Service, was placed in the correspondence file of Docket 5903. At about the same time the Charles Travel Service of Stockton, California, was contacted by a sales representative of American on the matter of the proposed nonstop proceeding. As a result of this latter contact, John Charles, Jr., of the Charles Travel Service, wrote to the Chairman of the Civil Aeronautics Board by a letter dated May 21, 1957, urging the Board to grant American's motion of May 3, 1957. This letter was received by the Board on May 27, 1957, and it was also placed in the correspondence file of Docket 5903.[26/] In urging the Board to grant American's motion, the letter of the Charles Travel Service stated that American would inaugurate transcontinental jet transport service before any of the two carriers that were then in the San Francisco-New York market would be able to begin such service. As a matter of fact, the sales representatives of American were using the argument that American would have at least six months' lead on TWA in inaugurating jet transport service to and from the West Coast in their various contacts for enlisting support of American's motion of May 3, 1957.[27/]

In a letter dated May 22, 1957, and received by the Board on May 27, 1957, Merritt Greene of Travel Advisors of San Jose, California, urged the Board to give early consideration to American's application for the third nonstop service.

[26/] Sales representatives of American carried with them the names and addresses of each Member of the Civil Aeronautics Board in making their contacts in the Bay area.

[27/] In point of fact, TWA actually inaugurated jet service out of San Francisco two days before American did.

The record is unclear as to whether or not a representative of American inspired or prompted the writing of Greene's letter.

Even if it assumed that American's management did not request its sales representatives to contact travel agents in the Bay area prior to the activation of the nonstop case, the activities of its sales people in California must be imputed to the carrier. It is a fair inference from the facts relating to the travel agents' communications to say that at least Startup was aware of what the carrier's sales people were doing with respect to travel agents in the Bay area. To the extent that Startup's testimony denies knowledge of contacts with travel agents in the Bay area by American's sales personnel during May, 1957, such testimony is not credited. It is here found as a fact that at least the Andrews' communication to the Board was the result of a direct result of solicitation on the part of American. Moreover, there is a strong probability that the Charles' communication of May 21, 1957, to the Board was also inspired by American.[23/]

[23/] Charles Travel Service was contacted by Richard Dominiak, a sales representative of American, some time after May 3, 1957. Prior to seeing Charles, Dominiak visited Clarence M. Shy, Director of Aviation of San Joaquin County at Stockton, California, and asked for the support of San Joaquin County in the nonstop matter. A resolution of San Joaquin County dated May 27, 1957, in support of an immediate hearing on American's proposal was filed with the Board on June 6, 1957. Dominiak advised Charles of his visit to Shy and the Stockton Chamber of Commerce and the reasons for those visits. The technical information contained in the Charles' communication of May 21, 1957, to the Board was furnished to Charles by Dominiak. Charles also received the name of each Board member and the address of the Board from Dominiak. While Dominiak did not recall asking Charles to do anything, there are obvious inconsistencies in Dominiak's testimony regarding his efforts to obtain support for American's motion from travel agents and chambers of commerce in the Bay area. Dominiak's denial of his solicitati of support from Charles cannot in all respects be credited.

There is further evidence in the record that during the year 1957, prior to the activation of the nonstop proceeding, one of American's sales representatives in the New York area discussed American's nonstop proposal with four travel agents in that territory, three of whom were asked to write their Congressmen with regard to the matter. This American sales representative was not acting under specific instructions from his superiors. As hereinafter shown, however, this and other sales representatives of the carrier solicited certain travel agents in the New York area in the early part of the year 1959 to have those agents write Members of Congress requesting the latter to appear at oral argument. The solicitations made of travel agents in 1959 resulted from specific instructions from the carrier.

As in the case of TWA and United, American maintains a rather exclusive club arrangement whose membership is limited for the most part to large users of air transportation via American Airlines. The carrier calls its club the "Admirals Club."[29/] The major purpose of the club is to provide the large users of air transportation a little more comfortable facilities than the usual airport terminal waiting room while the passenger is awaiting the departure of a flight. The record, however, reveals that American has been using its club for purposes other than providing a more comfortable waiting room for prospective departees on the carrier's flights. It has in a number of cases commissioned "Admirals" in its "Flagship Fleet" on the basis of a person's relative importance in his home community.

[29/] TWA and United call their clubs the "Ambassador Club" and the "100,000-Mile Club", respectively.

Recommendations for an "Admiral" appointment are generally made by the carrier's corporate officials, although other employees of the carrier also make such recommendations. These recommendations are usually approved by the District Sales Manager of the appointee's home town and by action of the "Admiralty Board" of the carrier. Illustrative of the lengths to which American has gone in commissioning "Admirals" of its "Flagship Fleet" and latching on to high-ranking civic, industrial and legislative leaders is the case of one Eveleth E. Hayden. Recommended for an "Admiral's" appointment in May, 1957, Hayden received his commission as an "Admiral" in the "Flagship Fleet" in August,. 1957. Hayden had never traveled on American Airlines in his life. He was recommended for an "Admiral's" appointment by the sales representative of American in the City of Oakland on the following grounds:

> ". . . . because the nature of his work for the major firms in Alameda County, Mr. Hayden is well acquainted with both legislative and civic leaders. Mr. Hayden has been of considerable assistance with every docket before the CAB -- giving support for AAL. He has enlisted the aid of all manufacturing associations in Alameda and Contra Costa Counties for Docket No. 5903."

Of course, not all of the "Admiral" appointees of American fail to use the carrier's services. On the contrary, in the great majority of cases the "Admiral" appointees are frequent passengers on American's flights. And in the case of Hayden the stated grounds for his appointment as an "Admiral" were somewhat exaggerated. Hayden became acquainted with American's nonstop application in early May, 1957; he distributed a copy of a resolution adopted by Alameda County Industries[30] to other trade organizations in the Bay area; and he urged those trade organizations to consider taking similar action with respect to American's nonstop application. The Alameda resolution was in the language of a form resolution distributed by American. Resolutions almost identical to the Alameda resolution were also sent to the Board and various Members of Congress by the Berkeley Manufacturers Association, Berkeley, California; Washington Township Industries, Inc., Fredmond, California; and the San Leandro Chamber of Commerce, San Leandro, California.

At the time Shipley and Strickler made their joint visit to San Francisco in February 1957, to get the ball rolling on the carrier's campaign to interest both the private business and public office sectors of the Bay area community in support of an expeditious hearing on the nonstop issue, there already existed a general understanding as to what Barbour's role would be in this particular endeavor of the carrier. This role was quite accurately defined in Barbour's memorandum to Strickler of November 2, 1956, as hereinbefore set forth. Barbour's function with respect to the proposed new nonstop proceeding was really a continuation of Barbour's activities in the San Francisco area in connection with American's application for various route extensions and adjustments, including the proposed nonstop authority between San Francisco/Oakland and New York/Newark, as litigated in the Denver proceeding.

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[30] Hayden is secretary of Alameda County Industries, Inc., which is a trade association in the Oakland area. The Alameda resolution supporting a third nonstop service between San Francisco and New York was adopted on May 22, 1957 and filed with the Board shortly thereafter. Copies of the Alameda resolution were also furnished to certain Members of Congress from California.

Barbour had furnished each of the daily newspapers of San Francisco a condensed summary of American's exhibits on the merits of the issues in the Denver proceeding in the form of a "memorandum to editors."[31] Supplying newspapers with information either through memoranda, releases or other types of written handouts during the pendency of proceedings before the Civil Aeronautics Board is a common practice in the airline industry. It was done by other carriers in the nonstop proceeding under Docket 9214, which is the subject of this reopened inquiry. Providing the newspapers with news from internal sources or other information services in new route cases before the Board has been a particularly consistent practice of air carriers. Similarly, the practice of providing information to the daily press is common to litigants in pending proceedings of other administrative tribunals. Indeed, the various regulatory agencies as well as the executive departments of the United States Government have their own press relations or public information offices designed to keep the public informed of their respective activities through the media of the

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[31] In the jargon of newspaper journalism a "memorandum" is a special type of written handout which provides background information on a particular subject for whatever use a newspaper might wish to make of it. A "news release" given to the press is an item that can be printed by the newspaper verbatim if the newspaper considers it properly written, factual and of general news interest. Even "news releases" are sometimes rewritten by newspapers before publication. The word "handout" generally refers to any written material that a press relations man might give to the press without reference to what particular classification it would fall into. A "memorandum to editors" is a very common document in newspaper journalism and may cover a wide variety of information which comes to a newspaper's attention and upon which the newspaper can either base a story or be kept informed of current news developments on a particular matter.

Nation's press and communications industry, including among other services the daily newspapers, radio, television, weekly news magazines and trade journals.[32]

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[32] Illustrative of news or press releases by both private litigants and government agencies are the following matters of record in this case: an undated news release of Delta Air Lines regarding Delta's position at oral argument before the Board in the Southern Transcontinental Service Case, beginning on September 26, 1960; a news release of Continental Air Lines for the afternoon papers of May 9, 1960, commenting on Continental's brief to the Examiner in the Trans-Pacific Route Case; a press release of Eastern Air Lines of August 26, 1960, making extensive comments on Eastern's brief to the Board in support of exceptions to the Examiner's Initial Decision in the Southern Transcontinental Service case; a press release of Western Air Lines of September 8, 1960, making comments on the carrier's presentation before the Board on oral argument in the Trans-Pacific Route Case; a radio release for 6:00 o'clock p.m. September 22, 1954, and a press release for September 23, 1954, by Riss and Company, Inc., Kansas City, Mo., listing its Attorneys with their Washington addresses and announcing the filing of a suit in Federal District Court in Kansas City, Mo., under the Sherman and Clayton Acts, alleging damages of $30 million and seeking to recover triple that amount as provided by the Nation's antitrust laws; a press release of September 15, 1949, wherein the then incumbent Attorney General of the United States, J. Howard McGrath, announced the filing on that day of a civil antitrust suit against the Atlantic & Pacific food chain; a press release of the Department of Justice of the United States of October 25, 1957, wherein the then incumbent Attorney General, Herbert Brownell, Jr., announced that the United States was filing on that day in the United States District Court in Chicago -- in accord with that Court's prior instructions -- the Government's proposed final judgment in United States v. E. I. duPont de Nemours *et al.*; and a press release by American Airlines announcing that the carrier filed suit on August 3, 1958, in the United States District Court, Southern District of New York, against the Airline Pilots Association, charging breach of contract on the part of the Association, which allegedly resulted in a pilots' strike.

To make the findings made in the above footnote conform generally to the contents of the press releases noted, appropriate citations of the cases involved have been omitted.

Barbour had two major roles to perform in connection with the nonstop proceeding which is the subject of this inquiry. The first role — the one that took up most of his time insofar as the nonstop issue was concerned during the years 1957, 1958 and 1959 — was that of an "errand boy" for Strickler, who was then working out of his Washington office, as well as an "errand boy" for Needles, Deputy City Attorney of San Francisco, who was coordinating San Francisco's various efforts to obtain an expedited hearing on the nonstop question. In his first role, Barbour made contacts for Strickler which Strickler could not make himself and supplied information to Needles which in some cases was unavailable to the City. This information dealt largely with the economics of San Francisco's transcontinental air services. In his second role, Barbour was engaged in supplying information to the daily press of the Bay area, primarily in the way of memoranda to editors, and secondarily in the way of releases, handouts and personal contacts. This dual activity of Barbour accounted for only a fraction of the time he spent on his regular duties as American's press representative in the Bay area in the years 1957 through 1959.

Since the airline industry is one affected by the public interest and since the industry must account for itself to the Congress and to various government agencies such as the Civil Aeronautics Board and the Federal Aviation Agency, it is American's view that it as a carrier serving the public must also account for itself to the Nation's press. The carrier's Vice President of Public Relations, Willis Player, stated in substance the carrier's policy of keeping the press informed in the following words:

> "American Airlines historically has regarded the matter of keeping the public and the press informed an obligation rather than a voluntary activity to be conducted at whim and irregularly. As part of its program for keeping the press informed, the company has consistently provided the press with summaries -- or, in some instances, complete statements -- of the company's position in various regulatory and court proceedings. Naturally, questions of news judgment are given due weight in determining how extensive a summary should be. But these judgments are not too difficult to make, since the press is always willing to advise.
>
> "Although the company has regarded its program of press and public information as an obligation, it may be noted that the company in practice has very little alternative. Almost all of the proceedings in which the company engages are public in nature. The orders, official actions and proceedings of the federal regulatory body are a matter of public record and are frequently the subject of C.A.B. press releases and the object of factual press coverage and editorial comment. Submissions by the carriers are also public and are available upon request. And even if it were possible to withhold information in these matters, it would be untenable from a public relations viewpoint to attempt to do so -- and would be contrary to the whole goldfish-bowl posture of the industry."

Player's "goldfish-bowl" philosophy is an interesting one and it no doubt represents the view of much of the airline industry. But there is no evidence that Player is an authority on the appropriate relations between a carrier in an adjudicatory proceeding and the legitimate interest of the press in such a proceeding.

With the filing of American's motion on May 3, 1957, the carrier's request for a nonstop proceeding at an early date and the efforts of the City of San Francisco and other municipalities in the Bay area supporting that request became a news matter of major importance in the daily press of the Bay area. 33/

33/ During the early months of 1957, Strickler was introduced by Barbour to certain of the publishers and a number of the editorial writers associated with the daily papers of San Francisco.

The daily newspapers of the Bay area gave wide publicity to American's motion of May 3, 1957, San Francisco's answer thereto, the resolutions of Boards of Supervisors and Chambers of Commerce, and the various individual efforts of civic and public officials in Northern California in appealing to the Civil Aeronautics Board for an early hearing. Each of the daily newspapers in San Francisco and certain of the daily newspapers in some of the outlying districts in the Bay area editorialized in support of such a hearing. The editorial opinion of the daily press in the Bay area was strongly concerned with the possibility that with the coming of the jet transports the Bay area would lag behind Los Angeles in adequate air service to and from the East Coast.

During all the times relevant to the nonstop proceeding under Dockets 5903 and 9214 the Civil Aeronautics Board maintained a commercial clipping or press intelligence service under which the editorials and news stories of general interest to the Board were furnished it by this service. The editorials and news stories sent by the service were circulated among Board Members immediately upon their receipt by the Board's Office of Information. 34/

In a letter dated May 23, 1957, George Christopher, the Mayor of the City and County of San Francisco, wrote James R. Durfee, then Chairman of the Board, as follows:

> "Your attention is directed to the enclosed newspaper editorials and articles supporting San Francisco in its endeavor to obtain additional nonstop air service to New York.
>
> "It is apparent that Northern California is aware of the present disparity of air service given to this portion of the state and the necessity of meeting the challenge of the jet age.

34/ Since the close of the hearings in this reopened inquiry, the Board has discontinued its commercial clipping or press intelligence service.

"Your consideration of San Francisco's request for an immediate and expedited hearing in this matter will be greatly appreciated."

The above letter and its enclosures were received by the Board on May 28, 1957. As the letter states, the enclosures consisted of newspaper editorials and articles supporting San Francisco in its endeavor to obtain additional nonstop service to New York. The editorials enclosed by the Mayor were frank in their endorsement of American as the third nonstop carrier between San Francisco and New York. Neither the Mayor's letter of May 25, nor any of the enclosures were formally served upon TWA, United or American. In a letter dated May 29, 1957, Mayor Christopher, as already noted, again wrote to the Board regarding the nonstop proceeding and on that date the Mayor enclosed a long list of persons and organizations that had already filed communications with the Board endorsing an early hearing on American's application. This May 29th letter was received by the Board on June 3, 1957. While the Mayor's foregoing letter of May 29, 1957, was served on TWA, United, and American and the Port of New York Authority, the communications referred to therein were not served on TWA or United, save for the letters of the Port of New York Authority, the Port Authority of Oakland and the Board of Supervisors of Alameda County.

Mayor Christopher sent another letter to Durfee dated May 29, 1957. This latter letter was received by the Board on June 4, 1957. The Mayor's second letter on May 29, 1957 transmitted further editorials and news articles, along with resolutions of several neighboring municipalities in the Bay area, as alleged "evidence" of Northern California's interest in the matter of additional nonstop service between San Francisco and New York.

Mayor Christopher would normally personally prepare letters of a routine nature such as the second May 29 communication filed with the Board on June 4,

1957. On matters pertaining to specialized data with which he was not familiar, such as the May 29 letter received by the Board on June 3, 1957, and similar communications of the Mayor which dealt with detailed and technical matters, the Mayor would consult with members of the PUC, particularly Chairman Martin, and with Deputy City Attorney Needles. The Mayor would not have sent the various newspaper clippings to the Board which accompanied his letters in May, 1957, without first consulting either a member of the City Attorney's staff or a member of the PUC.

Although the precise extent to which American had direct and contemporaneous knowledge of the fact that the Mayor made the foregoing transmittals by his communications of May 23 and 29, 1957, is not disclosed by the record, the carrier's personnel in San Francisco were aware of the Mayor's great interest in the nonstop matter, they were aware of the Mayor's request that copies of resolutions adopted by neighboring counties and chambers of commerce be sent to him, and they were further aware of the fact that the Mayor was sending materials to the Board. Moreover, San Francisco, through Martin, then Chairman of the PUC, and Needles, the Deputy City Attorney, had kept American generally informed of the various actions taken by San Francisco during this period.

The Bay area personnel of each of the three carriers -- American, TWA and United -- were aware of the news articles and editorials appearing in the Bay area press regarding the proposed nonstop proceeding. However, there is no evidence to show that TWA or United was aware of the fact that Mayor Christopher had caused the transmittal on an ex parte basis of materials which accompanied his letters of May 23 and May 29, 1957, to the Board at the time such transmittals were made.

By Order E-11493, adopted June 26, 1957, the Board denied American's motion for an expedited hearing on that portion of its application in Docket 5903 which would authorize it to provide nonstop service between New York/Newark and San Francisco/Oakland. However, by this same order the Board directed its staff to prepare a study of the New York-San Francisco service pattern and to submit the results of its study to the Board on or about December 1, 1957, so the Board could examine the public need for a hearing on the issue of the proposed nonstop service.

There are over 400 pages of communications in the Board's public correspondence file of the nonstop proceeding . Between the time that American filed its motion for severance and an expedited hearing on May 3, 1957, and the time this motion was denied on June 26, 1957, the Board received 77 separate significant communications from the Mayor of San Francisco, from numerous Members of Congress, from State and city officials, chambers of commerce and other community organizations as well as from certain private individuals -- a large part of them urging that a hearing be held on American's application. This period accounts for 221 pages of the total correspondence in the public correspondence file of the nonstop case. Of these 221 pages of correspondence during this period, 131 pages represent communications to the Board and 40 pages represent acknowledgments by the Board or a member of its staff to communications received by the Board. Enclosed in the communications from the Mayor of San Francisco were 41 pages of resolutions of various outlying municipalities in the Bay area and clippings from Bay area newspapers similarly urging the holding of hearings in this matter. Although in working in cooperation with San Francisco on the problem of obtaining a hearing on the nonstop issue American had access to and knowledge of many of the communications sent to the Board between May 3, 1957, and June 26, 1957, few of these communications were formally served on TWA, United, or American. These communications were simply placed, together with the Board's routine letters of acknowledgment, in the public correspondence file in Docket 5903, the docket then containing American's application.

The total correspondence in the nonstop proceeding consists of approximately 134 separate communications to the Board. The correspondence file was at all times during the nonstop proceeding open to the public in the Docket Sect of the Board.

With the denial of American's motion for severance and expedited hearing by a unanimous Board on June 26, 1957, and the Board's order of an informal staff study of the same date on the possible need for a new nonstop proceeding,[35] the fight on the part of American and San Francisco for the early activation of that portion of Docket 5903 proposing San Francisco-New York nonstop service entered a new phase. This phase of the struggle would continue until January 13, 1958, when the Board, by a divided vote, entered its order[36] activating the nonstop proceeding which is the subject of this reopened inquiry.

In a lengthy letter dated July 3, 1957, sent to each of the Board Member the Mayor of San Francisco expressed deep concern over the Board's denial of Ame can's motion. After noting that the Board had instructed its staff to complete

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35/ Order E-11493. Pursuant to its plan, the Board sent a top-level analyst its Bureau of Air Operations to San Francisco to make a study of the public interest in an early hearing on the nonstop issue. This study was completed in l 1957 but it was not disclosed to any party to the proceedings under Docket 9214 save that of the Bureau of Air Operations.

36/ Order E-12103.

a study of the air service pattern between San Francisco and New York on or about December 1, 1957, the Mayor's letter concluded as follows:

> "However, since the Board has concluded that an additional study is required, we urge a review of the time allotted for the completion of the study and propose that it be completed by no later than September 3. Also, the extreme importance to San Francisco establishes our right to participate in such a study.
>
> "Certainly a study of San Francisco's most pressing air need would not be complete without the views of the community most vitally affected and in no event should such a study be made on an ex parte basis. Therefore, we request a date on which we may sit down with the Board and its staff to discuss this problem, and we also request the Board to specify what additional information San Francisco may supply on this subject. Finally, we urge the members of the Board and its staff to visit the City of San Francisco to explore this problem with interested civic groups and individuals."

The Mayor's letter was received by the Board on July 5, 1957, and it was placed in the public correspondence file of Docket 5903. On July 11, 1957, the Chairman of the Board wrote Mayor Christopher stating that the Mayor's letter of July 3 was in effect a petition for reconsideration of the order denying American's motion and informed the Mayor that to the extent the letter constituted a request for reconsideration of the Board's order "it should be filed in conformity with the Rules of Practice with copies being served on other parties to the case." The Mayor then refiled his letter of July 3 showing service upon TWA, United, American, Oakland and the Port of New York Authority. This letter was then placed by the Board in the pleadings file of Docket 5903.

Between the dates of June 26, 1957, when American's motion was denied, and January 13, 1958, when the Board reversed itself on the question of the need for a new nonstop proceeding by another divided vote, a further group of documents was filed with the Board and placed in the public correspondence file.[37] Aside from Board acknowledgments of these or earlier communications, the correspondence file shows some 16 important communications to the Board during the period just noted. Fourteen of such communications were from Members of Congress either urging that a hearing be held or else transmitting letters from constituents without comment or with a request for advice from the Board as to the procedural status of the proposed nonstop proceeding.[38] In addition to the letter from the Mayor of San Francisco of July 3, 1957, which was refiled with the Board on July 22, 1957, at the request of the Chairman of the Board, several other direct communications to the Board were placed in the correspondence file. On July 17, 1957, the Redwood City Chamber of Commerce filed a letter with the Board urging the holding of an expedited hearing on the nonstop question and on November 27, 1957, the San Francisco Labor Council filed a wire with the Board also asking that hearings be held.

37/ The public correspondence file during the period noted above accounts for 44 more pages of material in the file.

38/ Regarding the resolutions already referred to which were filed by the city councils, chambers of commerce or county boards of supervisors in the outlying municipalities in the Bay area at the instance of either San Francisco or American, the great majority of such resolutions had been filed with the Board prior to the denial of American's motion on June 26, 1957. The resolution of the Richmond Chamber of Commerce was dated June 12, 1957, but it was not received by the Board until July 1, 1957. As in the case of the other resolutions filed, the resolution of the Richmond Chamber of Commerce endorsed the action taken by San Francisco through its PUC in supporting the motion of American and indicated that the resolution was being filed not only with the Board but with certain Members of Congress from California.

In a letter dated November 21, 1957, Hugh Gallagher, Chairman of San Francisco's Mayor's Committee, wrote to Sherman Adams at the White House calling Adams' attention to the efforts of Northern California to obtain immediate hearings on American's application. Attached to Gallagher's letter to Adams was a document entitled "Condensed Facts Sheet" which purported to be a summation of the salient facts in support of the request for an expedited hearing on the proposed third nonstop service between San Francisco and New York. Gallagher's letter and the attachments were received at the White House on November 25, 1957, and on the same day Adams wrote a brief transmittal letter to the Chairman of the Board conveying Gallagher's letter and the attached "Condensed Facts Sheet" to the Board without comment. The transmittal note of Adams and the attachments thereto were received by the Board on December 2, 1957.

Adams acknowledged Gallagher's letter of November 21 with a reply dated November 25, 1957. The relevant portions of this reply to Gallagher read as follows:

> "Thank you for your letter of November twenty-first concerning a hearing before the Civil Aeronautics Board on an application for a third nonstop air carrier between San Francisco and New York.
>
> "As you know, with respect to purely domestic matters, the Board was purposely established by the Congress as an independent quasi-judicial agency so that its decisions would be free of executive influence or interference. However, I will be glad to make a copy of your letter and the enclosed fact sheet available to the Board Chairman."

The "Facts Sheet" which found its way into the Board files on December 2, 1957, via the White House was prepared jointly by Strickler and Needles. There was an edition of the "Facts Sheet" which was furnished by American to San Francisco as early as 1956; but this edition was revised from time to time by Strickler and Needles. The Mayor of San Francisco had mailed the "Facts Sheet" to various Members of Congress from the State of California.[39/]

On February 11, 1958, after the activation of the nonstop proceeding on January 13, 1958, Barbour sent a memorandum to Strickler attaching a summary of various data on the nonstop problem, in almost identical form as the "Condensed Facts Sheet", as a proposed "memorandum to editors" of the San Francisco Bay area press. However, the record fails to show whether or not the proposed memorandum was actually circulated to the press.[40/]

On November 2, 1957, C.R. Smith, President of American, visited San Francisco and on that trip remained in that City for three days. Smith was then returning from Seattle where he had met with the officials of the Boeing Airplane Company regarding the progress being made on the Boeing 707 jet transport. Before going to Seattle Smith instructed Startup to arrange a luncheon for November 14th, to which luncheon there were invited bankers, businessmen, officials of the City and County of San Francisco and some

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[39/] At least in one instance a Member of Congress forwarded the Mayor's letter to the Chairman of the Civil Aeronautics Board along with the "Condensed Facts Sheet." It was received by the Board on December 9, 1957, and on December 12, 1957, the Congressman's letter was acknowledged by the Chairman of the Board and, in accordance with the Congressman's request, the correspondence enclosed by the Congressman was returned to him.

[40/] Barbour received the underlying data for the above proposed "memorandum to editors" from Strickler.

members of the press. About 30 persons attended the luncheon as guests of American. After the luncheon, Smith made a brief talk to the guests and answered a number of questions about the new Boeing jet transport which American was in the process of acquiring. At the close of this discussion, Smith told his audience that American was planning to inaugurate transcontinental jet service at the earliest possible date; that American's plans were to inaugurate the first such service out of Los Angeles to New York; and that the possibility of San Francisco receiving this type of service would depend upon Board action on the carrier's San Francisco-New York nonstop application. After most of the luncheon guests had left and again later in the day at his hotel, Smith had brief meetings with some members of the Bay area press.[41]

A news story in the San Francisco News[42] on November 5, 1957, reported on the Smith luncheon. Among other things, Smith was reported as saying that American had planned to inaugurate West Coast jet service with a Boeing 707 jet transport sometime in January 1959; that the first jet flights would be from Los Angeles to New York; and that San Francisco's chances of getting the first jet flights hinged entirely on whether the Civil Aeronautics Board would grant American nonstop authority between San Francisco and New York. The newspaper article of November 5, 1957, also stated that Smith urged San Francisco officials to press their efforts for a hearing on the nonstop matter because "you have to keep hammering * * * if you want to get anywhere." Smith was also reported by the same news story to have said that if the nonstop route was not granted, San Francisco would see jet service on the San Francisco-Chicago run by late February 1959. The entire record in this matter, including the testimony of C.R. Smith, leaves no doubt that Smith's comments to his luncheon guests and to the press on the day of the luncheon were approximately as related above.

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[41] The kind of luncheon meeting had by American in San Francisco on November 4, 1957, regarding the attributes and imminence of jet transport service was not unique to that City's situation. This was a continuing project on the part of the carrier for the large cities it served. Similar meetings were held by Smith or other American officials with respect to the carrier's jet equipment program in Los Angeles, Dallas, Chicago and other points.

[42] The San Francisco News later merged with the San Francisco Call-Bulletin and the newspaper is now known as the San Francisco News-Call Bulletin.

Smith himself took no direct part in directing the activities of the carrier's personnel in the Bay area in trying to enlist support for American's motion for an early hearing. These activities were under the executive direction of C.W. Jacob, and Jacob reported to Smith from time to time on the progress of these activities.

It should be noted that during this time no motion with respect to American's nonstop application was actually pending before the Board. The carrier's motion for severance and an expedited hearing had been denied on June 26, 1957. As already stated, the Board had simply announced that it would make a study of the San Francisco-New York service pattern through its staff and that study was due on or about December 1, 1957. Moreover, no one of the later parties to the nonstop proceedings had yet sought intervention in Docket 5903.

Shortly after the Smith visit to San Francisco, the City and County of San Francisco sent a delegation to Washington to have an informal conference with the Board, arranged by certain Members of Congress from California. This conference was held on December 2, 1957.[43] A transcript of the conference was made available to anyone desiring it. The whole conference covers only 17 pages of transcript. The conference was publicized in the trade press and the contents of the transcript of the conference were made available and were promptly made known to TWA and United.

San Francisco was represented at the conference by Joseph W. Martin, Jr., then Chairman of the PUC of the City and County of San Francisco, and by Albert E. Schlesinger, then President of the San Francisco Downtown Association.[44] Shortly before the date of the conference a San Francisco newspaper reported a statement by Martin to the effect that the Board would have to be "pressured" and that the City was going to hire a "lobbyist" to advance its interests in the nonstop matter.

The man engaged by the City was Donald W. Cleary who preceded Martin and Schlesinger to Washington and acted as a sort of guide for and adviser to the San Francisco delegation. Cleary's normal job is that of serving as a legislative representative for the City of San Francisco in Sacramento. Cleary's principal contacts in Washington regarding the nonstop matter were with Members of Congress from California and New York. Before leaving for Washington, Cleary was briefed in San Francisco on the nonstop problem by Strickler at the request of Martin.

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[43] It has been the established policy of the Board to have such informal presentations by municipalities as to their general needs for improved air service. For example, similar conferences have been held by the Board in the past with representatives of Orlando, Houston and Reno. Indeed, United, one of the complaining carriers regarding the off-the-record matters in the New York-San Francisco nonstop proceeding, recently took part in such a conference with the Board relating to the proposed merger of United with Capital Airlines. During this conference, United's President was allowed to comment on the merits of the merger proposal to a limited extent.

[44] Schlesinger is a San Francisco businessman who served as President of the Downtown Association during the years 1957 and 1958.

At the beginning of the conference on December 2, 1957,[45] the Chairman of the Board, James R. Durfee, apparently very angered by a story appearing in the San Francisco Examiner on November 21, 1957, to the effect that the Board would have to be "pressured" and that the City was hiring a "lobbyist" to advance its[46] cause, made clear to the San Francisco delegation that the Board would only discuss the City's general aviation problems and that it could not under any circumstances discuss on an ex parte basis any specific application for service to and from San Francisco then pending before the Board. Indeed, the Chairman stated to the San Francisco delegation that if the Board's willingness to enter into such a conference was to be characterized "as an opportunity to turn on pressure" he would terminate the conference right then and there. Mr. Martin thereupon explained:

> " . . . the word 'pressure' was undoubtedly a silly word to use. However, I meant to say, and I did say time and time again during this long procedure that what we were trying to do was to get the interest of San Francisco before the Board in the most effective and legitimate way which I believe is traditionally the representations of our Congressmen and Senators to the Board.

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[45] In addition to the Chairman, three other Board Members and the San Francisco delegation of two representatives, the conference was attended by six members of the Board's staff.

[46] A similar story appeared in the San Francisco Chronicle on November 21, 1957.

"If any error has been made, it is my error and I certainly hope the people of San Francisco and Northern California will not be penalized by my error. This hearing [a hearing before an agency of San Francisco where Martin made the statement] actually occurred some two or three weeks ago. There was a subsequent hearing before the Board of Advisors. I corrected this mistake, but I am willing to make any type statement the Chairman thinks in order to clarify what I said and to explain it, and if necessary to apologize to the Board."

The remainder of the conference consisted of a generalized discussion of San Francisco's desire to have the Board give attention to its need for additional transcontinental nonstop service to New York. Certain of San Francisco's other air service problems were also generally mentioned. However, at one point in the conference Chairman Durfee asked Martin whether he would be willing to make an appropriate correction to statements in the newspapers which carried the "pressure" and "lobbyist" story.[47/] Martin responded by saying that he would be willing to make any type of statement that the Chairman thought in order to clarify what he had said and to make apologies to the Board if necessary.

The San Francisco delegation was shocked by Chairman Durfee's reprimand and by the cool reception it received at the hands of the Board. After the conference, Martin met with Senator Kuchel of California and the Senator and he prepared a statement for the San Francisco press making clarification of San Francisco's approach to the nonstop problem as reported in the press prior to the conference.[48/] Martin asked the San Francisco press to publish it as an

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[47/] The "pressure" and "lobbyist" story had also been reported in a Washington aviation trade journal prior to the convening of the conference.

[48/] On the evening of December 2, 1957, Martin, Cleary and Schlesinger met socially at a dinner with Shipley and Strickler in Washington.

explanation and correction of his earlier remarks as reported in the San Francisco press and at least one of the San Francisco daily newspapers did publish the explanatory story on the morning of December 3, 1957.

Even more surprising than the numerous ex parte communications which deluged the Board offices between May 3, 1957, and the date of San Francisco's informal conference with the Board on December 2, 1957, which preceded the Board's reversal on January 13, 1958, of its previous order denying an expedited hearing on American's proposal, were the reactions to that reversal in the Bay area press and among the officials of San Francisco and American. In letters to Martin and Schlesinger, both of which were dated December 5, 1957, C. W. Jacob found Martin's presentation of December 2, 1957, "just right" and "effective" and Jacob congratulated Schlesinger on his "effective representation" of San Francisco before the Board on December 2, 1957. On January 14, 1958, the San Francisco Examiner termed the Board's order activating the nonstop proceeding "a clear victory for San Francisco city officials who had lobbied vigorously for just that decision." Martin credited the result to the "efforts of Senators Knowland and Kuchel and Representatives Mailliard and Shelley . . . . the Mayor, the Board of Supervisors, the San Francisco Chamber of Commerce, the Downtown Association, business and labor organizatio and our Public Utilities Commission." The San Francisco Chronicle of January 15, 1958, described the decision "a sweet victory to many Bay area political groups and civic leaders" and noted Cleary's mission "to organize support for the hearing." In remarks made to the Board of Directors of the Downtown Association of San Francisco on July 16, 1958, Strickler stated that the Board's action was the fruit of "the untiring, united and unparalleled efforts put forth by your city government, the Chamber of Commerce, the newspapers and this very Association. . . ."

The next stage in the development of the record in the nonstop proceeding thus begins on January 13, 1958, when the Board, by Order E-12103, with two members dissenting, activated the New York-San Francisco Nonstop Service Case by severing from American's application in Docket 5903 that portion relating to the San Francisco-New York nonstop issue, assigning it Docket 9214, and ordering an expedited hearing thereon.[49] By Order E-12337, dated April 9, 1958, the Board denied, again by a divided vote, the petitions of TWA and United for reconsideration of Order E-12103. By Order E-12511, the Board on May 15, 1958, consolidated into the proceeding under Docket 9214 an application of Northwest Airlines filed on April 29, 1958, requesting New York-San Francisco nonstop authority.

A prehearing conference in the new proceeding under Docket 9214 was held on April 29, 1958, before Examiner Bryan. The Examiner's Report of that conference was served on the parties on May 6, 1958, and in that Report the Examiner established July 8, 1958, as the date for public hearings in the matter. In addition to the two applicants, American and Northwest, the following others were made formal parties to the nonstop proceeding: the Port of New York Authority; the City and County of San Francisco; San Francisco Chamber of Commerce; the Oakland Chamber of Commerce and the City of Oakland; TWA; and United.

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[49] After the nonstop proceeding was activated on January 13, 1958, the correspondence file in Docket 5903 became a part of the correspondence file to be maintained in Docket 9214.

After the announcement in the Examiner's Report of Prehearing Conference that public hearings were scheduled to begin on July 8, 1958, it became evident that several of the parties would not be able to prepare their exhibit material and their written testimony in time to go to hearing by that date. Accordingly, by Notice dated June 16, 1958, the Examiner upon request of the Bureau of Air Operations of the Board and United postponed the hearings to July 29, 1958. Thereafter, because of some difficulties in obtaining a hearing room for the public hearings on July 29, 1958, the hearing date was further postponed until July 30, 1958. As already noted, hearings were held by the Examine on July 30-31 in San Francisco and on September 9-18, 1958, in Washington. Considering the complex issues and momentous private and public interests involved in the proposals for nonstop authority between San Francisco and New York on the part of American and Northwest, it is found that the hearing schedule achieved by Examiner Bryan in this matter met the Board's requirement of an "expeditious hearing" as directed by Order E-12103.

Of the remaining 100 or so pages of the public correspondence file in the nonstop proceeding under Dockets 5903 and 9214, about 30 pages are dated betwee January 13, 1958, and March 9, 1959, when the Examiner issued his Initial Decis

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50/ One of the 30 pages of correspondence is an acknowledgment by the Board dated March 11, 1959, of a letter received prior to March 9, 1959.

After the activation of the nonstop proceeding and prior to the Examiner's Initial Decision thereon, 14 pages of the public correspondence file represent direct communications to the Board; the remaining pages in the main represent letters of acknowledgment from the Board to these or earlier communications. One of those pages of the correspondence file is a telegram of June 23, 1958, from the Mayor of San Francisco expressing concern to the Board over the postponement of the hearings from July 8 to July 30, 1958, and requesting that the hearings be concluded in the month of July 1958. This telegram of Mayor Christopher was the only instance after the activation of the nonstop case of an ex parte communication from a formal party to the proceeding.

The remainder of the above 14 pages of correspondence consists of 12 communications from Members of Congress from either the State of California or from the New York area. These communications may be summarized as follows: (1) Letter dated May 12, 1958, from Congressman Shelley inviting the Board to hold hearings in San Francisco; (2-3) transmittal slips from Congressman Shelley dated June 24, and from Senator Knowland dated June 25, forwarding copies of the telegram to the Board from the Mayor of San Francisco referred to above; (4) telegram dated June 27 from Senator Kuchel supporting the Mayor's telegram; (5) letter dated June 27, from Congressman Mailliard enclosing certain "pertinent information" on the nonstop issue and expressing concern over delays in the hearing schedule; (6-7) letters dated February 3, 1959, from Senator Engle and Congressman Younger each enclosing a letter received from the Mayor of San Francisco and asking advice as to the status of the case; (8) letter dated

February 9 from Congressman Cohelan stressing the importance to San Francisco of jet service and urging that the case be expedited; (9) letter dated February 10 from Congressman Clem Miller urging that the case be expedited and requesting advice as to when a decision might be expected; (10) letter dated February 16 from Congressman Johnson of California stating his interest in an early decision; (11) letter dated February 24 from Congressman George Miller requesting that he be permitted to appear at the oral argument; and (12) letter dated March 3, 1959, from Senator Case transmitting without comment a letter from the Rona Travel Service, Passiac, New Jersey, which the Senator received on March 6, 1959.

In the field of public relations after the activation of the nonstop case, Barbour, as the head of the carrier's press and public relations department in San Francisco, continued to do about what he had done during the pendency of the Denver proceeding. He circulated to the press a wide variety of material bearing directly on the merits of the issues involved in the nonstop proceeding. Thus, on June 12, 1958, Barbour circulated a press release in behalf of the carrier outlining in general the carrier's proposal in the nonstop proceeding and stressing again that the carrier would inaugurate transcontinental jet transport service out of San Francisco about the same time it began such service out of Los Angeles if American's nonstop application were approved. This press release summarized the carrier's exhibits filed on that day in the nonstop proceeding with regard to the kind of schedules the carrier proposed to inaugurate between San Francisco and New York. It is also "plugged" the Boeing 707 jet transport which the carrier was in the process of acquiring.

On July 14, 1958, Barbour circulated a comprehensive "memorandum to editors" to the daily press in the Bay area which purported to be a more extensive summary of the exhibits of American Airlines in the nonstop proceeding and covered, among others, such subjects as proposed schedules, proposed passenger fares and airfreight tariffs, projected traffic participation on the assumption of three carriers in the nonstop market, and estimates of diversion of traffic from TWA and United, thereby arguing the cause of the carrier's application in terms of the various criteria of air carrier choice. The foregoing "memorandum to editors" also reported "summaries" of exhibits of United and TWA and for the most part the latter summaries were critical of the positions of the two carriers then in the San Francisco-New York market in the nonstop proceeding.[51] On September 5, 1958, Barbour circulated another "memorandum to editors" to the Bay area daily press which, among other things, set forth the name of the Examiner handling the nonstop proceeding, the parties to be heard, and a chronology of the procedural steps already taken in the nonstop case. This memorandum also contained much argumentative material on the merits of the nonstop issue.[52]

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[51] The "memorandum to editors" of July 14, 1958, was intended to furnish the background information to the Bay area press for the civic portions of the hearings which were held in San Francisco on July 30-31, 1958.

[52] The "memorandum to editors" of September 5, 1958, was intended to supply background information to the Bay area press for the air carrier portion of the public hearings which were held in Washington on September 9-18, 1958.

American's policy of providing press releases, memoranda to editors, and handouts bearing directly on the merits of the issues involved in the nonstop proceeding after its activation and before final decision thereon was basically no different than the policy followed by other air carriers in the industry in similar circumstances. As already noted, American had followed a similar policy with respect to pending litigation in courts of law. When asked, however, whether he would furnish the press in the Bay area with materials bearing on the merits of pending litigation involving American in a court of law in San Francisco, Barbour replied that he would not furnish the press such material. When asked to explain the difference in his attitude toward litigation before the Civil Aeronautics Board and litigation involving his carrier before a court of law, Barbour replied as follows:

> "Well, it was my understanding very early that the Civil Aeronautics Board is a quasi-judicial agency but also an arm of Congress, that is, it carries out the legislative directives of Congress. In its judicial aspects, it has the same privileges as a court of law . . . . being an agency of the Congress, matters pertaining to commercial aviation might logically be brought to the attention of the general public .... through the newspapers and in turn might possibly be noticed by their legislative representatives."

When queried as to the object of all the releases and background information given to the Bay area press which in some instances was the identical information contained in the carrier's exhibits and in the formal record upon which the Civil Aeronautics Board would make a decision in the matter, Barbour replied as follows: 53/

53/ As the only competing applicant for the nonstop authority between San Francisco and New York, Northwest followed a policy similar to that of American in providing information to the press on the merits of the nonstop issue.

"Well, to assist the newspaper men in covering a matter of general public interest in the San Francisco Bay area."

On June 25, 1958, Bone, then Regional Vice President of Sales for American in Los Angeles, sent the following memorandum to Shipley at his office in Washington:

> "In line with our discussions about getting better established with the top people in San Francisco, Elmo and I had a luncheon at the Bohemian Club last Thursday for Al Schlesinger, President of the Downtown Association, Lee Ettelson, Publisher of the Call-Bulletin, Dion Holm, City Attorney, our friend Frank Needles, Deputy City Attorney, and Dick Pearce, editorial writer for the Chronicle. Since our interests in San Francisco are common at the moment, we also had Bob Murray, Executive Vice President of Pan American, along, and Tom Barbour, of course, was there.
>
> "It was set up to be an entirely social gathering, but by coincidence it happened to be set for the day on which the postponement of the SFO-NYC nonstop hearing was announced so there was much discussion about that, all with high indignation on the part of the good citizens of San Francisco.
>
> "We called upon and Commissioned as an Admiral of our Flagship Fleet Charles Theriot, Publisher of the Chronicle, the same afternoon.
>
> "The next day we had a luncheon in Oakland for Bob Flynn, President of the Oakland Chamber of Commerce, who is also Division Manager of Pacific Telephone and Telegraph Co., R. Stuart Moore, President of Los Angeles-Seattle Motor Express, Inc., and the most active and influential citizen of Oakland with regard to transportation matters, and George M. Keffer, Vice President and Manager of the Crocker-Angelo National Bank, Oakland.
>
> "As promised, we propose to have some sort of a get together with influential citizens each time I visit San Francisco, which is about once every three weeks on the average, and as discussed at the Sales Council Meeting in New York the other week, we shall get other officers of the company to participate in similar get togethers whenever possible."

As of the time of the above memorandum, George Elmo Coon was District Sales Manager for American in San Francisco. Coon aided Bone in contacting various persons in the Bay area regarding the nonstop case and in checking on prospective witnesses for the public hearings in the matter.

A copy of the above memorandum was sent to the carrier's headquarters in New York. Attached to the above memorandum, as sent to Shipley, were editorials appearing in the San Francisco Examiner and the Call-Bulletin on June 23, 1958. These two editorials are discussed below.

As already noted in mid-June 1958, the Examiner handling the nonstop proceeding for the Board announced postponements of the public hearings from July 8 to July 30, 1958. These announcements kicked up a real storm in the Bay area press. A lead editorial entitled "CAB Fumbles Again" appearing in the San Francisco Examiner on June 23, 1958, lashed out at the Board for delaying the hearings as "a regulatory body mired in confusion and languor" and otherwise heaped inexcusable abuse upon the Board's processes. The editorial appearing on the same day in the San Francisco Call-Bulletin entitled "CAB Pokes Along" was almost equally intemperate.

The June 23 editorial from the San Francisco Examiner was mailed to the Board by Congressman Mailliard of California as an enclosure of "pertinent information" on the nonstop matter with his letter of June 27, 1958, referred to above. This letter was received by the Board on July 1, 1958. Congressman Mailliard's letter was acknowledged by the Vice Chairman of the Board, Chan Gurney, on July 3, 1958, in which Vice Chairman Gurney went into painstaking detail to demonstrate that an earlier public hearing on the nonstop matter was virtually impossible if a fair hearing were to be afforded to each party to the proceeding. Virtually the same letter was sent by Gurney to certain other Members of the California Congressional delegation. In a letter dated July 22, 1958, the then Chief of the Board's Office of Information, William Kloepfer, Jr., wrote to the Editor of the San Francisco Examiner explaining, among other things, that because of the procedural processes that had to be observed by the Board, a proceeding such as the nonstop matter necessarily required some reasonable time to litigate. Aside from the Kloepfer letter and the letters of the Vice Chairman dated July 3, 1958, to Congressman Maillaird and other Members of the California Congressional delegation, little was done to support the Board from the unjust clamor and criticism of its procedures which followed the postponement of the hearings in the nonstop matter and against which a court of law is normally insulated.

American's efforts to have the merits of its nonstop proposal aired in the public press did not cease with the conclusion of the public hearings on the matter. In a memorandum dated November 13, 1958, addressed to A.A. Paradis, an Assistant Secretary of the carrier stationed in its New York headquarters, Taylor had various suggestions for Paradis as a possible agenda for a forthcoming top-level staff meeting to be held in New York. Among the suggestions made by Taylor were the following:

> "Community Affairs work to build groundwork for publicity in San Francisco upon release of the Examiner's decision, New York-San Francisco, Nonstop. This should come out around December 10th. Full impact of the publicity should go to the CAB and pertinent legislators through proper channels." (Emphasis supplied).

Taylor had been aware that the nonstop proceeding was getting a great deal of newspaper publicity in the San Francisco area and he hoped that some of the press coverage would come to the attention of the Civil Aeronautics Board. To the extent his use of the phrase "through proper channels" intended to apply to the Board, it was, of course, a contradiction in terms. Taylor knew that there were no "proper channels" to the formal record at the

Board for publicity efforts by a carrier in a new route proceeding. Taylor also hoped at the same time that some of the press coverage on the nonstop proceeding would also come to the attention of Members of Congress in Northern California. Except for a request of Strickler by Congressman Shelley of California for certain materials appearing in the San Francisco press for use in oral argument before the Board as hereinafter discussed, there is no evidence that American actually caused any of the press stories or editorials appearing in the San Francisco daily press to be sent to the Civil Aeronautics Board or any Member of Congress from the State of California.

As in the case of courts, a regulatory tribunal is hardly in a position to defend itself from unwarranted furor and unjust condemnation. In the situation which developed with the Civil Aeronautics Board in the case of the nonstop proceeding, there is nothing in the record to show that American's personnel, either official or non-official, did anything to protect the Board from the abuses visited upon it during the processing of the nonstop proceeding. On the contrary, there is considerable evidence in the record to demonstrate that the carrier agitated various persons in the Bay area in the matter of not only setting a hearing out of turn on the nonstop issue but also in the matter of the time it took to render a final decision in the nonstop proceeding. There is no evidence, however, to show that the lawyers representing American in the nonstop case failed in any way in their duty to the Board in the various phases of the litigation in the nonstop proceeding in maintaining that respectful attitude toward the Board which is expected of the

Civil Aeronautics Board practitioners and of lawyers in general. Nor is there anything in the record to show that the lawyers for the carrier in the nonstop case encouraged any of the ex parte argument which found its way into Board files.

Briefs to Examiner Bryan in the nonstop proceeding were filed with him on November 10, 1958. As already noted, his Initial Decision was rendered on March 9, 1959. Again, considering the complex and controversial issues involved in the proceeding, including, among others, the impact of the operation of jet-type aircraft in a market the size and importance of that involved in the case, it is found that Examiner Bryan met the Board's direction for an "expeditious" disposition of the matter.

Thomas J. Mellon, Vice President and General Manager of the Wessix Electric Heater Company in San Francisco, has since the year 1957 been a past President of the San Francisco Chamber of Commerce and also a member of the Mayor's Committee of San Francisco. From January 1957 to September 1959, Mellon discussed the nonstop proceeding with various American Airlines personnel, principally with Shipley.[54]

Under date of January 30, 1959, Shipley wrote the following letter to Mellon, copies of which were sent to Jacob in New York and Taylor in Washington:

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[54] Among the many persons in the Bay area with whom Mellon discussed the nonstop matter were various City officials and Congressmen Mailliard and Shelley. Mellon also discussed the nonstop matter with Senators Kuchel and Engle of California. Upon being informed by the PUC that certain California Congressmen, as well as Senator Engle, planned to appear at oral argument before the Board, the PUC asked Mellon to induce Kuchel to also appear. Senator Kuchel had a definite policy of not appearing before administrative tribunals but he promised Mellon that he would do what he could in behalf of San Francisco in the nonstop case.

> "It was very good to hear from you and thoughtful of you to write about the 'First Flight Cover.'
>
> "We were of course very disappointed that C.A.B. had not acted in time to permit the start of the San Francisco-New York jet service at the same time as the Los Angeles service was inaugurated. Although our whole program of jet introduction was slowed down for reason of the strike, we are still hoping to start the San Francisco-Chicago-New York service with the 707 Jet Flagship on March 1.
>
> "I am at a loss to understand the reasons for the continuing delays in the C.A.B. proceeding. The Examiner has the reputation for issuing his initial decisions promptly, yet the hearing was closed and the case submitted to him $2\frac{1}{2}$ months ago. There is some indication that his report will not be issued for another month or two. It is difficult to escape the conclusion that the delays have been directed from the Commission itself. If this conclusion is true, San Francisco is being miserably discriminated against. (Emphasis supplied).
>
> "I have not been on the West Coast since October, but am hoping to get out before too very long. When I do, I shall look forward to a visit with you. If you should come East, I do hope you will let me know."

The above letter was written in response to an inquiry of Mr. Mellon whom Shipley considered a good friend. At the hearing in this reopened inquiry, Shipley denied that he was trying to spread the impression to the people of Northern California that the Board was intentionally delaying the disposition of the nonstop case. Shipley's credibility is beyond question. What Shipley had in mind was that the overall time between the date of the filing of American's motion on May 3, 1957, and the issuance of the Examiner's Initial Decision was intolerably long and that the Board was in part accountable for that time lag. But the unfortunate juxtaposition of his speculation upon the reason for the lack of an Initial Decision as of January 30, 1959, as emphasized above was most misleading.

Both Shipley and Taylor had numerous conversations with certain Members of Congress during the years 1957 through 1959 concerning the nonstop proceeding. In the majority of the contacts with Members of Congress by Shipley and Taylor regarding the nonstop question, such contacts were with Members of Congress from the New York area and from the State of California. In some instances such contacts were initiated by the Member of Congress or his assistant; in other and much more frequent cases, Shipley or Taylor introduced the subject of the nonstop proceeding to various Members of Congress from California, New York, and New Jersey and Connecticut.

In line with the carrier's policy of keeping the Members of Congress advised on new route developments affecting constituents, Shipley and Taylor had numerous personal visits with selected Members of Congress. For example, Shipley personally visited with Senator Kuchel of California after the Board issued Order E-11493 on June 26, 1957, which for a time denied American's request for an expedited hearing, for the purpose of advising the Senator of the Board's action and to inform him of the carrier's disappointment over its initial failure to obtain a new nonstop proceeding. Prior to the denial of that motion, Shipley had discussed the nonstop issue with the Senator's Assistant. During the summer of 1957 Shipley also saw Senator Knowland of California to outline to the Senator the probable benefits of American's proposed nonstop service between San Francisco and New York. Among other Members of Congress visited in person by Shipley were Congressmen Shelley of California in the spring of 1957 and on frequent occasions thereafter; Congressman Mailliard of California in November 1957;

and Congressman Younger of California in late 1958. Each of the foregoing Senators and Members of the House in Congress had written to the Board at one time or another during the years 1957 through 1959 relative to some aspect of the nonstop proceeding and in some instances carbon copies of those letters were sent to Shipley.

As the carrier's liaison man with Congress during the year 1957 and most of the year 1958, Taylor, of course, had numerous legislative matters to discuss with individual Members of Congress and appropriate Congressional committees, including, among others, the proposed revision of the Civil Aeronautics Act of 1938, certificates for supplemental air carriers, problems of air traffic control, proposed postal rate increases and various pending bills regarding taxes. Although Taylor contacted several Members of Congress with respect to American's motion as filed on May 3, 1957, most of Taylor's contacts with Members of Congress regarding the nonstop matter took place after the conclusion of the public hearings in the case. In these latter contacts Taylor was primarily interested in apprising Members of Congress from the State of California and from the New York area of the oral argument before the Board in the proceeding in the expectation that such Members of Congress would submit either oral or written argument in support of American.

Before oral argument, Shipley called Robert Smith, American's metropolitan sales manager in New York, and asked Smith if his sales representatives, in the course of their regular sales' duties would encourage some of their accounts to write their Congressmen asking them to appear at oral argument. Thereafter, as shown below, sales representatives of the carrier in the New York area were asked to contact travel agents and large users of American's service to have the latter write to Members of Congress of their interest in the proceeding.

In March-April 1959, following the issuance of the Examiner's Initial Decision, American through Taylor contacted several Congressmen from the New York metropolitan area in an effort to obtain support for the carrier's position in the nonstop proceeding. These Congressmen were advised that they could personally appear at oral argument before the Board or that they could express their views to the Board in writing. No caveat was expressed by Taylor to the Congressmen with regard to sending copies of any communications to other parties to the proceeding. As a result of Taylor's activities, a number of communications from Members of Congress were received on the merits of the issues and acknowledged by the Board. In at least one instance, a communication from a Member of Congress on the merits had been composed by a representative of American.

Oral argument before the Board on the merits of the applications of American and Northwest for San Francisco-New York nonstop service under Docket 9214 et al. was held on April 29, 1959. The following Members of Congress personally appeared and took part in that argument: John F. Shelley, George Miller, J. Arthur Younger, John F. Baldwin, John F. McFall, Jeffery Cohelan, Harold T. Johnson, Clement W. Miller, and William S. Mailliard, as representatives in Congress from the State of California; Eugene J. Keogh, Isadore Dollinger, Francis E. Dorn, and Robert R. Barry, as Representatives in Congress from the State of New York; and Francis X. Dooley, representing Senator Dodd of the State of Connecticut.[55]

As the argument opened, the Chairman announced that Senators Engle and Kuchel of California, Congressmen John E. Moss of California, Victor L. Anfuso of New York and Frank Osmers of New Jersey had submitted written statements of their respective positions with respect to the issues of the case. And during the argument Congressman Shelley of California submitted statements from Congressmen Harlan Hagen and Charles S. Gubser of California on the merits of the nonstop question.

The remaining pages of communications in the public correspondence file of the docket in the original nonstop proceeding bear dates from March 23, 1959, two weeks after the Initial Decision was issued, through April 29, 1959, the date of the oral argument before the Board, except for three communications which were received by the Board after the conclusion of oral argument. In these pages there are approximately 20 separate significant communications to the Board. The rest of the pages consist primarily of letters of acknowledgment to these or earlier communications.

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[55] Except for Congressmen Gubser, Hagen and Dorn, each of the abovenamed Members of Congress, including Senator Dodd, was personally contacted by Shipley or Taylor or Strickler at one time or another during the pendency of the nonstop proceeding before the Board. Other Members of Congress were also contacted by American with reference to the nonstop matter. As already noted, the Examiner's Initial Decision was issued on March 9, 1959. The Notice of Oral Argument before the Board was issued on April 3, 1959. On April 13, 1959, at the invitation of Congressman Sisk of California, Taylor and Strickler attended a luncheon in a Washington hotel with Sisk and several other Members of the California delegation to the House of Representatives where the nonstop proceeding was discussed. In general, the discussion of Taylor and Strickler with the Congressmen related to the issues of the nonstop proceeding, the positions of the various parties to the case and the fact that oral argument before the Board would soon be held.

The 20 important communications received by the Board after the issuance of the Initial Decision may be summarized as follows: (1) Letter dated March 11, 1959, from Congressman Cohelan asking for permission to be heard at oral argument; (2-3) transmittal slip and a letter of transmittal from Congressmen Addonizio and Derounian, each dated March 23 and forwarding without comment a letter from a travel agent favoring American's application; (4) letter dated April 2 from Congressman Rooney transmitting without comment a letter from a travel agent favoring American's application; (5) letter dated April 9 from the Office of the Governor of California to the City Attorney for San Francisco enclosing a written statement by the Governor in lieu of oral argument and asking the City Attorney to forward the statement to the Board at the proper time; (6) letter dated April 22 from Senator Kuchel enclosing a statement of his position on the merits and requesting that the statement be received under Rule 14;[56] (7) letter dated April 22 from Congresswoman St. George stating her position on the merits; (8) letter dated April 24 from Senator Engle submitting his statement under Rule 14;[57] (9) letter dated April 28 from the Chief Clerk of the California Assembly transmitting without comment Assembly Resolution No. 27 favoring a third New York-San Francisco nonstop service;[58] (10-13) letters and statements dated April 28 from Senators Javits and Keating, and Congressmen Osmers, Anfuso and Wainwright stating their positions on the merits and, in all cases but one, specifically requesting that the letters or statements be received under Rule 14;[59] (14-17) letters and statements dated April 29 from Congressmen Moss, O'Brien, Sisk and Multer stating their views on the case and, in all cases but one, specifically requesting that the letter or statement be made a matter of public record;[60] (18) transmittal slip dated April 30 from Senator Keating forwarding without comment a letter dated April 25 from a constituent favoring American's application; (19) transmittal slip dated May 5, from A. J. Goodpaster of the White House forwarding without comment California Assembly Resolution No. 27 and a letter from Gerald D. Morgan of the White House to the Chief Clerk of the California Assembly acknowledging the receipt of the Resolution; and (20) letter dated May 7, 1959, from Senator Case transmitting without comment on the merits an undated telegram from a travel agent requesting that the Senator support American's application.

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[56] The letter was received by the Board prior to oral argument and as already noted, the Chairman of the Board specifically stated at the argument that the statement would be "included in the docket."

[57] As stated above, Senator Engle's statement was referred to by the Chairman at oral argument when he referred to Senator Kuchel's.

It has long been the practice of the Civil Aeronautics Board to permit the appearance of Members of Congress at oral argument before the Board on the issues involved in new route applications. Indeed, individual Board Members have in the past expressed interest in such argument by Members of Congress. As in the case of air carriers in other new route proceedings, certain of the officials of American Airlines arranged for considerable private electioneering in the nonstop case to induce the attendance of the various Members of Congress whose constituencies were affected by that proceeding.

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[58] The Resolution itself was read at oral argument by Congressman Johnson of California.

[59] The letter from Senators Javits and Keating inadvertently referred to the Rule as "Rule 13." The statements of Congressmen Osmers and Anfuso were referred to by the Chairman at oral argument when he referred to Senator Kuchel's.

[60] Congressman Moss' statement was also referred to by the Chairman at oral argument when he referred to Senator Kuchel's.

Thus, in regional sales meetings of the carrier's zone managers and sales personnel in the New York area held in the summer and fall of 1958, Taylor discussed American's pending route proceedings and suggested to sales representatives of the carrier that they contact their customers, including travel agents, for the purpose of having them write to their Congressmen urging them to appear at oral argument in behalf of American in the nonstop case. Similarly, during the early months of 1959 Shipley requested American's sales representatives in the New York area to contact travel agents and large users of the carrier's services for the purpose of having them write to their respective Congressmen requesting the Congressmen to appear at oral argument. Prior to giving the foregoing instructions, Shipley had been talking with Taylor and Taylor reported to Shipley that some of the Members of Congress with whom Taylor had discussed the matter indicated that it would be helpful to them if they had some expression of interest in the nonstop matter from their constituents. Shipley's specific instructions to the zone managers and the sales representatives of the carrier were to the effect that if any of the large users of American's service were willing to ask their Congressmen to appear at oral argument they were to be told by the carrier's zone managers and sales representatives to write to their respective Congressmen to that effect.

In answering Congressional inquiries as to what certain Members of Congress could do in the nonstop matter prior to the activation of the proceeding, both Shipley and Taylor suggested to individual Congressmen that they might write to the Board to endorse an early hearing. At no time in such contacts did either Shipley or Taylor advise the Congressmen contacted of the requirements of Rule 14 of the Board's Rules of Practice in Economic Proceedings.

The text of Rule 14 is set forth in Appendix B attached hereto. This Rule gives to any person not a party the privilege of appearing at any hearing (other than in an enforcement proceeding) and presenting relevant evidence, and of presenting a written statement on the issues involved in a proceeding to the Examiner or the Board, which statement is to conform to the requirements as to "form, content, service and time of filing" applicable to the briefs of parties. None of the correspondence to the Board by various Members of Congress urging a hearing on American's application for nonstop service complied with the foregoing requirements of Rule 14. It was the position of Shipley and Taylor that the Board's regulations as to the form, content and service of the documents were not applicable at that stage of the proceeding and that Congressional correspondence urging a hearing on American's application was appropriate in the circumstances and consistent with the Board's practice in other new route proceedings.[61]

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[61] It was Taylor's view that if he had gone to any Member of Congress and suggested that the Member's communications to the Board had to comply with the requirements of Rule 14 with respect to form, content and service to all parties to the proceeding, he "would have been laughed out of the room."

A further provision of Rule 14 allows certain public persons to participate in oral argument in any proceeding in which argument has been assigned. As already noted, Taylor apprised various Members of Congress, both in the New York area and those from the State of California, of the pending argument before the Board after the issuance of the Examiner's Initial Decision. In approaching Members of Congress to advise them that oral argument was pending in the nonstop matter, Taylor also advised them that they might submit a letter in lieu of appearing at oral argument. Again, it has long been the practice of the Board to accept written statements of Members of Congress for the record in lieu of oral argument on pending new route proposals. As already noted, a number of Members of Congress appeared in person at oral argument, while others submitted individual statements in lieu of oral argument. The communications submitted in lieu of oral argument either expressly referred to the Board's Rule 14 or were obviously so intended. Each of the Members of Congress who participated in the oral argument whether in person or by statement in lieu of argument supported the certification of a third nonstop carrier between San Francisco and New York.

Prior to oral argument, Congressman Shelley's office requested Strickler to furnish that office with a complete set of articles and editorials concerning the nonstop issue which had appeared in the daily press of San Francisco in order that the Congressman could present those press clippings to the Board at oral argument as evidence of the public interest in the Bay area in the nonstop proceeding. Barbour made the collection of clippings and gave them to Strickler for delivery to Congressman Shelley. At oral argument the

Congressman offered "a set of clippings from San Francisco newspapers discussing the need and importance of a third nonstop air carrier between San Francisco and New York." Chairman Durfee of the Board declined to receive the press clippings from Congressman Shelley with the statement that "we would be inclined to question the probative value of newspaper clippings."

At the oral argument, Congressman Younger of California stated that since May, 1957, he had aided San Francisco's effort to obtain a third nonstop air carrier to New York. Congressman Younger had not appeared at the hearing and his "aid" to San Francisco is unexplained in the record except for certain letters from the Congressman to the Board dealing in the main with the procedural aspects of the case and the need for a third nonstop carrier. During the oral argument, Congressman Younger strongly supported the Initial Decision of the Examiner which found that American should be selected as a third nonstop carrier between San Francisco and New York.

While the Members of Congress participating in oral argument on the nonstop issue made a better than usual attempt at discussing some of the evidence adduced at the hearing, not a single Member of Congress participating in that argument addressed himself to the real meaning of the facts before the Board. Thus, no Member of Congress attempted at oral argument to weigh the probable need for a third New York-San Francisco nonstop in terms of the drastically changed economics of the jet age which have wrought such a revolution in the productivity potential of carriers using turbojet aircraft. In its order inactivating the nonstop proceeding, the Board asked the applicants and intervening carriers to focus their proof on the impact of the operation of jet aircraft in a market of the size and importance involved in the case. Of course, no Member of Congress was either equipped to argue or expected to argue the facts attending the planned operation of turbojet aircraft in the market in question -- facts which the Board considered of primary importance in determining the economic practicality of three-carrier competitive service between San Francisco and New York.

As in the case of appearances by Congressmen in other new route proceedings, each member of Congress appearing before the Board in the nonstop matter argued for the certification of the proposed additional service for their respective home districts. The Congressmen uniformly endorsed the pleas of the San Francisco Bay and New York areas for the third nonstop service without analyzing any of the major fortifying or countervailing considerations bearing upon the ultimate issue of the probable public need for a third nonstop routing. Such analyses were left to the lawyers for the formal parties to the case who followed the Congressmen in the argument.

In addition to permitting the appearances of Members of Congress at oral argument before the Board as well as the appearances of State and Federal officials generally, Rule 14 of the Board's Rules of Practice in Economic Proceedings, permits the filing with both the Examiner and the Board of written statements on issues involved in the proceeding. As already found, several Members of Congress utilized the latter method of getting their views to the Board. Similarly, the record discloses that various chambers of commerce, boards of supervisors and other civic groups filed written statements on the merits of the nonstop matter with the Examiner and the Board.

The Manager of the Transportation Department of the San Francisco Chamber of Commerce, Charles C. Miller, contacted other chambers of commerce in the Bay area urging them to file a statement on the merits of the nonstop issue with the Examiner under Rule 14. Miller was careful to advise the outlying chambers of commerce in the Bay area to comply with the requirements of Rule 14 with respect to such matters as the number of copies required for filing and their service on other parties. A number of such statements by chambers of commerce in the Bay area were properly filed with the Examiner.

From the inception of the proceeding, the officials of San Francisco contacted and requested the support of various boards of supervisors in the Bay area. At least 13 of the Bay area County Boards of Supervisors filed statements on the merits of the nonstop issue under Rule 14 with the Examiner and the Board after the conclusion of the public hearings in the nonstop proceeding. Except for minor deficiencies,[62] these statements generally complied with the requirements of Rule 14.

It has consistently been the practice of the Examiners of the Board and the Board itself to receive statements under Rule 14 on the merits of issues in a new route proceeding after the close of public hearings and in lieu of the filing of a brief to the Examiner or to the Board, even when such statements did not comply with the requirements of Rule 14 as to form, content, service and time of filing. It is this general practice which guided Miller of the San Francisco Chamber of Commerce in contacting the chambers of commerce of the outlying communities in the Bay area after the close of hearings in urging them to file statements under Rule 14 with the Examiner and the Board. Miller has had long experience in participation before the Board in new route proceedings and it is his view that prior to the activation of the nonstop proceeding by Order E-12013, of January 13, 1958, there was no "case" pending before the Board, and that, accordingly, during the period between May 3, 1957, the date of the filing of American's motion, and January 13, 1958, the date of the Board's order assigning the nonstop matter for hearing, it was entirely proper for civic groups to send communications to the Board without service on other persons that might eventually have an interest in the proceeding.

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[62] Apparently, through inadvertence the resolutions of the County Board of Supervisors of San Mateo and Santa Clara Counties found their way into the Board's correspondence file in Docket 9214 et al. However, each of the latter resolutions directs the Chairmen of the two Boards of Supervisors to file with the Examiner and the Civil Aeronautics Board statements under Rule 14.

TWA and United allege procedural improprieties and an attempt to pressure the Board on the part of the Mayor of San Francisco because of the Mayor's very frequent letters to the Board prior to the activation of the nonstop proceeding,[63] and because the Mayor's open solicitation of support from Senators, Congressmen and other public officials in attempting to obtain an expedited hearing on American's proposal for nonstop service.

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[63] In addition to many earlier letters, the Mayor sent a telegram to the Board on June 23, 1958, which protested the postponement of the hearings from July 8, 1958, to July 30, 1958. The Mayor also wrote a letter dated January 30, 1959, to various Members of Congress from the State of California expressing deep concern over the time the Examiner was taking in issuing his Initial Decision and voicing fears that the further procedural steps necessary before final decision by the Board would adversely affect San Francisco for the reason that the San Francisco-New York market was not getting nonstop jet service on or about the same date the Los Angeles-New York market received such service. Jet nonstop service was inaugurated between Los Angeles and New York on January 25, 1959. As a result of the Mayor's letter of January 30, 1959, at least two Members of Congress from the State of California wrote to the Board regarding the procedural status of the nonstop proceeding.

Procedural improprieties and attempted pressure upon the Board have also been alleged by TWA and United against Joseph W. Martin, Jr., Chairman of the PUC of San Francisco during the early procedural stages of the nonstop proceeding. As already noted, Martin was primarily responsible for the wide circulation given to a resolution of the PUC in support of an early hearing which was adopted after the filing of American's motion. In addition to writing to Senators Kuchel and Knowland and Congressmen Shelley and Mailliard of California prior to the activation of the nonstop proceeding, Martin also wrote to George W. Milias, President of the California Republican Assembly, and to Mrs. Marjorie H. E. Benedict, a Member of the Republican National Committee from California during the same period and in each case expressed San Francisco's interest in an early proceeding on the nonstop problem. Martin expected that both Milias and Mrs. Benedict would write to Members of Congress from California. As a result of Martin's letters, both Milias and Mrs. Benedict wrote to Senator Kuchel asking for his help in San Francisco's effort to obtain a hearing on the nonstop question.[64]

Martin's correspondence with Members of Congress from California and with Milias and Mrs. Benedict was in each case accompanied by a copy of the resolution of the PUC supporting American's motion for an expedited hearing. This correspondence by Martin and the letters resulting from Martin's communications to Milias and Mrs. Benedict,[65] were sent shortly after the filing of American's motion and long before the activation of the nonstop proceeding on January 13, 1958. After the proceeding was set down for hearing, no Congressional support was sought by the PUC other than asking certain Members of Congress from California to appear at oral argument before the Board.

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[64] Martin, who has been active in Republican party affairs in California in recent years, also went to his friends in the Democratic party in California and requested that they write to their Congressmen asking for support of an early hearing on the nonstop issue. Whether as a result of Martin's efforts or for other reasons, a number of prominent Members of the Democratic party of California also wrote to the Board on the same issue.

Mayor Christopher and Chairman Martin of the PUC were both articulate and forthright witnesses. Each testified with complete candor and the testimony of both Christopher and Martin is in all respects reliable and worthy of belief.

Mayor Christopher and Chairman Martin of the PUC were frank in testifying that each did what he could to solicit support for an early hearing on the question of a third nonstop carrier between San Francisco and New York. Mayor Christopher unequivocally stated that he contacted Members of Congress in this regard and that he contacted "every one else in the Bay area who had a vital interest in the airport of San Francisco, telling them of the situation that prevailed and soliciting their support." The Mayor unhesitatingly stated that he sought all the support he could get in trying to get an early hearing and decision on the nonstop matter. His testimony in this regard is in part as follows:

> "It is my policy as the Mayor of San Francisco to do all that I can to further the interest of my City. Whether it is getting a baseball team or getting a new airline route or whatever it is that we are seeking, we seek the support of our surrounding Congressmen and public officials.

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[65] Both Milias and Mrs. Benedict wrote to Senator Kuchel regarding San Francisco's interest in the nonstop case in the latter part of May, 1957, after each received a letter from Martin on the same problem.

> "In circulating this particular Letter [letter of January 30, 1959, noted above] I solicited the help and cooperation of various public officials surrounding San Francisco Bay."

Similarly, Martin, following a policy established by the PUC in 1956, set out to do everything he could to get an early hearing on the proposal for a third nonstop carrier for the San Francisco-New York market. As previously noted, copies of the PUC resolution supporting American's motion had been sent to the Senators from California, Congressmen from the San Francisco metropolitan area, outlying municipalities and other interested persons. In commenting on the wide circulation given that resolution Martin testified as follows:

> "Q Will you tell us to whom this resolution was distributed in addition to the persons named in that last paragraph?
>
> "A I can't tell you that. I wouldn't remember but I know that we sent it all over Northern California.
>
> "No, just who got it and at what times, I wouldn't know, but it received very wide distribution. I am sure that newspapers all got it. This was our campaign document. This was our policy." (Emphasis added).

The evidence is conclusive that generally the activities of Mayor Christopher and Chairman Martin of the PUC in the solicitation of support from Members of Congress, other public officials and private citizens took place prior to Board's Order E-12103, dated January 13, 1958, granting an expedited hearing. Among the exceptions to the latter finding are the Mayor's telegram of June 23, 1958, which protested the postponement of the public hearings on the nonstop question, and the Mayor's letter of January 30, 1959, to various Members of Congress expressing anxiety over the time the Examiner was taking with his Initial Decision. There is no proof in the record that either Mayor Christopher or Chairman Martin solicited anyone to contact or correspond with the

Board after January 13, 1958, except insofar as the Mayor and the PUC urged Congressmen to attend oral argument before the Board and except insofar as the Mayor's letter of January 30, 1959, to various Members of Congress from California constituted an indirect approach to the Board through Members of Congress regarding the procedural status of the nonstop proceeding.

In reviewing the activities of American and the varied pursuits of the civic parties regarding the litigation of the nonstop proceeding, there is the problem of responsibility of American for the actions of others in connection with alleged violations of the Board's Rules. Besides the City and County of San Francisco, this reopened inquiry also covered the activities of the Chamber of Commerce of San Francisco, the City of Oakland and the Oakland Chamber of Commerce and the Port of New York Authority.

Copies of the answer of the Port of New York Authority filed with the Board on May 20, 1957, to American's motion for an expedited hearing filed on May 3, 1957, were sent to Senators Ives and Javits of New York. In a letter dated June 12, 1957, and filed with the Board on June 14, 1957, Senator Javits joined in the Port Authority's request for an early hearing on the nonstop question. After the issuance of the Examiner's Initial Decision and prior to oral argument by the Board, the Port of New York Authority sent a wire to Senator Javits, as well as to Senator Keating, advising the Senators of the imminence of oral argument before the Board and of the position of the Port Authority in support of a third nonstop carrier. Neither Senator Javits nor Senator Keating appeared at the oral argument; but, as already noted,

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these two Senators sent a joint letter to the Board immediately prior to the argument endorsing the certification of a third nonstop service between New York and San Francisco. No other communications were sent by the Port Authority to any other Member of Congress. The activities of the Port of New York Authority followed its usual practice and that of civic intervenors in other new route cases in keeping Members of Congress advised of pending new route matters affecting their constituencies and the actions of the Port Authority in this regard were made without any motivation or suggestions whatsoever on the part of American.

In the case of Oakland, American asked the Oakland Chamber of Commerce to file a request with the Civil Aeronautics Board to hold an early hearing on the carrier's proposal for a third nonstop service. In a letter dated May 27, 1957, filed with the Board on June 3, 1957, the Oakland Chamber of Commerce filed a request with the Board in support of an immediate hearing on additional nonstop service between the Bay area and New York. This letter was not served on TWA or United but a copy of it was sent to Strickler of American.[66] The Manager of the Aviation Division of the Oakland Chamber of Commerce, Howard Waldorf, wrote to Congressman Cohelan and George P. Miller on March 11, 1959, advising the Congressmen of the findings made in the Examiner's Initial Decision and of the Chamber's interest in a third nonstop route between the Bay area and New York.

66/ As in the case of other new route proceedings, the Aviation Board of the Oakland Chamber of Commerce called in representatives of the interested carriers to make a presentation on the need for a new nonstop proceeding. Since the Aviation Board of the Oakland Chamber had invited TWA and United on the issue of a third nonstop in the Denver proceeding, only American was invited to make a presentation before the Committee with respect to American's motion of May 3, 1957. Strickler made the presentation.

Strickler's contacts with the Chamber of Commerce of Oakland prior to the activation of the nonstop proceeding were made for the purpose of seeking support for the carrier's motion for an early hearing. His appearances before the Aviation Board of the Chamber of Commerce followed the normal procedure of air carriers generally in new route proceedings in advising communities of proposals upon which a hearing is sought before the Board. In writing to the Board on May 27, 1957, requesting a hearing on American's application and in advising Congressmen Cohelen and George P. Miller of Oakland's interest in the nonstop proceeding, the Oakland Chamber acted independently of American or any of its representatives.[67]

In the case of the San Francisco Chamber of Commerce, all of the carriers serving the Bay area, including American, TWA and United were aware of the practice of the Transportation Committee of that Chamber in holding informal hearings with respect to new route applications formally moved for hearing before the Board. Indeed, each of the three carriers were represented on that Committee and its respective representatives voted on the motion as to whether or not the Chamber would support San Francisco's request for an expedited hearing. Moreover, of the three carriers only United then had a representative on the Board of Directors of the Chamber which had the power to override the Transportation Committee's recommendation that the Chamber support an early hearing on the merits in the nonstop matter. There was nothing unusual or clandestine about Strickler's contacts with the San Francisco Chamber of Commerce. As is the usual practice in the airline industry, Strickler presented American's case for an expedited hearing through the Chamber and after the proceeding was activated Strickler and Miller discussed the type of proof the Chamber of Commerce proposed to offer. Similarly, prior to the hearing on the merits of the proposals of American and Northwest, Strickler talked to Miller about prospective user witnesses for the Bay area. Strickler did accompany Miller to interview two of such prospective witnesses but this practice was discontinued after Miller's objection on the ground that some prospective witnesses might be reluctant to support the Chamber's position if a representative of an airline were involved in the request for a witness to appear at the hearing in behalf of the Chamber or the City and County of San Francisco. Strickler also made suggestions to Miller as to the kind of testimony that might be most useful by prospective user witnesses and Miller adopted some of the suggestions made. Although Miller took violent exceptions to Strickler's efforts to suggest the kind of proof to be adduced at the hearing, Strickler's practice is not uncommon in air carrier contacts with civic parties in new route cases. In the end, Strickler interviewed some of the users of air service whose testimony he thought might help the position of the Chamber; Needles and Miller interviewed others in the Bay area; and after the interviewing of respective witnesses was completed, Miller made the choice of the persons who were to testify on behalf of the Chamber of Commerce of San Francisco in the hearings on the nonstop proposals.

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[67] The City of Oakland, acting by and through its Board of Port Commissioners, participated in the nonstop proceeding as a formal party. It filed a statement with Examiner Bryan in lieu of a brief on the merits of the issues and it endorsed and supported the Initial Decision of the Examiner served on March 9, 1959, in a later statement filed with the Board.

As already shown, the San Francisco Chamber of Commerce by letter to the Board dated May 24, 1957, supported the efforts of the PUC of San Francisco to obtain an expedited hearing on American's nonstop proposal. On the same date, E. D. Maloney, President of the Chamber, wrote letters to Senators Knowland and Kuchel, and Congressmen Mailliard, Shelley, Younger, Allen, Scudder, Baldwin and George P. Miller informing these Members of Congress that the Chamber was supporting the resolution of the Board of Supervisors and the PUC of the City and County of San Francisco and asked the cooperation of each of the Members of Congress just noted. Attached to the letter to the foregoing Members of Congress was a copy of the May 24, 1957, letter to the Civil Aeronautics Board. As a matter of fact, a copy of the letter of May 24, 1957, to the Board was also sent to all members of the Transportation Committee of the San Francisco Chamber of Commerce. Since American, TWA and United each had representatives on that committee, the three carriers were not unaware of the Chamber's efforts to support the City and County of San Francisco in obtaining an expedited hearing on the nonstop question.

Although the Chamber of Commerce of San Francisco received advice, information and suggestions from representatives of American, the Chamber's practice of sending communications to the Board and to Members of Congress in support of an expedited hearing represented an independent decision on the part of the Chamber to so proceed. After the activation of the nonstop proceeding on January 13, 1958, Miller of the San Francisco Chamber of Commerce continued to consult with American through Strickler regarding the type of proof to be adduced in the civic portion of the hearings; but Miller exercised his independent judgment on the final composition of the Chamber's exhibits and selection of witnesses called to support the Chamber's or the City's position.

In view of the prolonged contacts between American and the officials of San Francisco, the very close collaboration between these two parties through a considerable portion of the nonstop proceeding, and the meshing of the early efforts of the carrier and the City to obtain favorable action on the carrier's request for an expedited hearing on the nonstop issue, the alleged responsibility of American for the actions of the City and County of San Francisco presents a more difficult problem of fact. The proof necessary to establish such responsibility is the evidence adduced on this problem during the reopened hearings and not the evidence which might be required but remains unadduced or nonexistent as a matter of required demonstration of an improper relationship between the carrier and the City and County of San Francisco. Since the carrier must be shown to have been actually responsible for the actions of San Francisco, the mere fact that representatives of the carrier might have hoped or wished that San Francisco would take a course of conduct which later turned out to be injudicious or improper is not by itself such evidence as the law requires as the basis for legal inference for blame on the part of the carrier. In short, a demonstration of responsibility on the part of American must clearly show the carrier as the actual moving cause or power which impelled San Francisco to the alleged objective of improperly pressuring or attempting to exert improper pressure on the Board.

Of primary significance to American's relationship with San Francisco during the period May 3, 1957, when American's request for an expedited hearing was filed, to June 26, 1957, when that request was denied, and from the latter date to January 13, 1958, when the nonstop proceeding was activated, is the vital and uncontroverted fact that during this entire period all that San Francisco was seeking from the Board was a hearing. Martin's testimony clearly states San Francisco's policy in this regard:

> "I have always made it clear to Mr. Shipley and everybody else that we didn't care which airline got the third nonstop route as long as we got adequate service."

There is substantial evidence to show that San Francisco independently charted its own course of action from the very beginning of the events encompassed by this reopened inquiry. While the officials of San Francisco had been discussing and focusing on the need for a new nonstop proceeding soon after the Board's denial of such proposed service in the Denver proceeding, the City flatly rejected American's request that it file a motion to activate a new nonstop proceeding in the early months of 1957. Following the filing of American's motion for an early hearing on May 3, 1957, the officials of the City and representatives of the carrier met frequently to discuss strategy for favorable action on the carrier's request. San Francisco concedes that representatives of the carrier aided and advised San Francisco whenever called upon in the preparation of the numerous communications and pleadings which thereafter flowed from the offices of the Mayor and the PUC on the limited question of the carrier's request for an expedited hearing. However, the record is clear that the representatives of the carrier, particularly Shipley and Strickler, served solely in an advisory capacity and as helpers and not as policy makers or drafters of communications and pleadings.[68] It is true that American employees circulated a draft form of resolution in support of an expedited hearing on the nonstop question to the outlying chambers or trade associations in the Bay area; but this activity was not a joint venture on the part of the carrier and the City and County of San Francisco. Although information regarding the outlying chambers of commerce was no doubt exchanged between the carrier and San Francisco, the record holds the carrier wholly accountable for the circulation of the form or draft resolution. The City circulated a draft resolution of its own to the outlying municipalities in the Bay area.

It is also true that Strickler made numerous contacts with the officials of San Francisco prior to the filing of American's motion on May 3, 1957, and that he supplied those officials various types of economic data relating to the alleged need of a third nonstop carrier between San Francisco and New York.[69] But rightly or wrongly, the practice of air carriers' contacts and the provision of economic data relating to proposed new route applications by their representatives to civic officials and organizations is commonplace in the airline industry. Strickler was aware from early 1957 that the final decision as to the contents of communications and pleadings of San Francisco rested primarily with the City Attorney's office and other City officials.

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[68] Thus, Martin further testified as follows: "I informed Mr. Strickler of the many actions that we were taking. I discussed what actions he was taking . . . we considered up to a point that we could use American Airlines here, use their help, their staff."

[69] And, as previously noted herein, the carrier's Public Relations Office in San Francisco supplied similar information to the daily press of the Bay area.

Strickler was used by the City as a source of needed traffic information and related data, as a "secretary" and as a valuable "leg man" to make up for the City's lack of staff in organizing its campaign to enlist support for a new hearing on the nonstop issue. The fact that American and the City sought the same objective of an expedited hearing, of course, was a boon to the City's efforts.

It is not uncommon in the law for persons or prospective parties on the same side of a cause awaiting trial to work together on the matter. Litigants with common interests traditionally pool their resources whether it is a case before a regulatory tribunal or a case in the courts. American has in the past provided other cities with assistance similar to that provided San Francisco in this case. San Francisco has in other cases accepted similar assistance from other carriers. Indeed, the cooperation between the Bureau of Enforcement of the Board and United and TWA without notice to either American or San Francisco in this reopened inquiry is a familiar example of several parties to a case exchanging information and joining in a single presentation at the trial.

Admittedly the City and County of San Francisco sought aid of the United States Senators and Congressmen in furthering the objectives of an early hearing on the nonstop question. But San Francisco did not rely upon American to obtain Congressional support in any way during the nonstop proceeding.

It had experienced politicians in the Mayor and the Chairman of the PUC and influential private citizens it could rely upon and did rely upon in contacting Members of Congress from California. The City was handling its own case under the overall policy direction of the PUC and Mayor Christopher and under the trial direction of Dion Holm, City Attorney, and Frank J. Needles, Deputy City Attorney. Each of the latter officials have had long experience in the institution and conduct of transportation proceedings before the Board and other regulatory tribunals. Although American participated in discussions regarding Congressional and other official support for the City's efforts to obtain an early hearing on the nonstop question, San Francisco made its own decisions and contacts for such support. The following straightforward testimony of Martin accurately portrays the City's attitude regarding the assistance of air carriers in this respect:

> Q. Did you discuss this help of your Congressmen with anyone from American Airlines?
>
> "A. Oh, sure. I am sure that Mr. Strickler and I discussed it. He took over for American Airlines after we got into this thing or maybe when we were getting into it, but I don't remember.
>
> "He was actually useful to us as far as I was concerned. We have got a terribly small staff and we are trying to run and build an airport. We haven't got many leg men and we made it a practice to accept the help of all the airlines whenever we were walking down the same side of the street.
>
> "They could do the leg work because we have no staff to even get the information."

> Q. Limiting my question now to specifically the Congressional support, how did Mr. Strickler help you, if in any way?
>
> "A. I don't think that Mr. Strickler helped us in the Congressional support. I think that the City's interest in the thing is what got the Congressional support. I am certain that I told him who we were going to contact." (Emphasis added).
>
> Q. You told Mr. Strickler who you were going to contact?
>
> "A. We discussed this with the Mayor. I think all the - well, I think that practically all, if not all of the contacts with Congressmen and Senators, were made by City officials.
>
> "Now, American undoubtedly was making their own but we weren't relying on American. We didn't know what they were going to say and we had our own story to tell and we wanted to tell it." (Emphasis added).

Strickler did not contact Governors Brown or Knight or Lieutendant Governor Powers of California, or any Members of the Legislature between January 13, 1958, and September 2, 1959. During this same period, with the exception of seeing Congressman Baldwin on one occasion, attending Congressman Sisk's luncheon in Washington and furnishing Congressman Shelley with materials appearing in the Bay area press, Strickler had no contacts with any of the California Congressional delegation. Strickler met with Congressman Baldwin in Washington in the spring of 1959 prior to oral argument before the Board and Strickler then discussed the possible appearance of the Congressman at oral argument at the suggestion of a private citizen of the Bay area. Taylor did not contact any California State officials, members of any California Chambers of Commerce, or any City officials of the State of California. He never met with Donald Cleary, the Downtown Association or the San Francisco Labor Council regarding the non-stop proceeding.

Strickler was with Taylor at Congressman Sisk's luncheon in April 1959 at the invitation of Congressman Sisk. As already noted, the luncheon followed the issuance of the Examiner's Initial Decision and the discussion on that occasion concerned itself with the question of California Congressmen participating at oral argument or submitting a statement in lieu thereof. But San Francisco already had communicated with the Congressmen, requesting them to appear at oral argument. Strickler and Taylor were invited to the Sisk luncheon to give the Congressmen some back ground on the nonstop proceeding and to acquaint or reacquaint the various Congressmen present with the nature of an oral argument before the Board.

It has already been found that Taylor spoke to various Congressmen in Washington both with respect to the filing of American's motion for an early hearing and then later with respect to the possible attendance of various Members of Congress at oral argument. Again, rightly or wrongly, such Congressional contacts were a part of Taylor's duties. Shipley also talked to Senators Knowland and Kuchel and Congressmen Shelley, Younger, Allen, Mailliard and others. As in the case of Strickler and Taylor, Shipley informed various Congressmen on the progress of the nonstop proceeding and made suggestions to the Congressmen if requested to do so. The fact of airlines contacting and informing Congressmen about new route proceedings, as well as regarding numerous legislative matters affecting the industry, is a common and well-known practice in Washington. The major trunkline carriers each has one or more men that act as their representatives on Capitol Hill for those very purposes.

The record leaves no doubt that American pursued its own activities on Capitol Hill regarding the nonstop proceeding, both before and after its activation. Moreover, the evidence is conclusive that San Francisco on its own and through its own devices sought the support of California's Congressional delegation prior to the Board's grant of an expedited hearing and for the purposes of oral argument before the Board. The evidence is likewise plain that while representatives of American aided and advised San Francisco whenever called upon in the preparation of the City's communications and pleadings, such communications and pleadings were not incited or propelled by the representatives of the carrier working with San Francisco on the nonstop matter. However, it must here be made clear that the absence of responsibility on the part of American for the actions of San Francisco does not affect the accountability of each individually to the provisions of the Board's Rules.

Looking at the original nonstop proceeding as a whole, there is really nothing exceptional about the communications to the Board contained in the public correspondence file in Dockets 5903 and 9214. Communications such as these -- from Congressmen, other public officials, civic groups and private citizens -- are common with the Civil Aeronautics Board and other regulatory proceedings. Moreover, the communications to the Board in the nonstop case did not set forth meaningful facts or arguments not already brougnt to the Board's attention in the formal papers of American and San Francisco, but

Statement of Ultimate Facts

Whatever may be the Board's decision and recommendation to the Court with respect to the alleged violations of the Board's Rules leveled against American and the City and County of San Francisco in the litigation of the nonstop matter, this reopened inquiry has failed to adduce sufficient evidence[81] to show that the Port of New York Authority, the Oakland Chamber of Commerce and the San Francisco Chamber of Commerce have either individually or in concert with American violated the Board's Rules of Practice in Economic Proceedings or the Principles of Practice of the Civil Aeronautics Board. The activities and the communications of each of the latter parties were but few and sporadic in nature; their communications to the Board and to Members of Congress either observed the Board's Rules or were merely commonplace communications such as are often made to the Board or to Members of Congress manifesting a civic interest in a new route application; and to the extent activities and communications of each of the latter parties can be called ex parte or extra record, such activities or communications were entirely lacking in any intent to violate the Board's Rules, much less to deny a fair hearing to TWA, United and Northwest. As a matter of fact, neither the Bureau of Enforcement nor the complaining carriers, TWA or United, take the position in this

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81/ The filings by the Port of Oakland with the Board in the nonstop proceeding were made in accordance with the Board's Rules of Practice. The Port of Oakland did not engage in any ex parte activities during the course of the nonstop proceeding.

reopened inquiry that any party except American and San Francisco has violated the Board's Rules.

In the case of American and San Francisco, the alleged violation of the Board's rules will be disposed of by ultimate findings in the context of both the Board's Rules of Practice and its Principles of Practice. The pertinent provisions of the Board's Rules are attached hereto as Appendix B. The Board's Rules of Practice in Economic Proceedings are known as Part 302 of its Procedural Regulations (14 C.F.R. 302, et seq.) and the Board's Principles of Practice are known as Part 300 of the Board's Procedural Regulations (14 C.F.R. 300 et seq.). A proper guide to the interpretation to the Board's Principles of Practice are the various accepted professional standards of conduct involved in a party's participation in an adjudicatory proceeding, as gauged and measured by the Canons of Professional Ethics of the American Bar Association.

On March 18, 1960, the Board issued a Notice of Proposed Rule Making, Docket 11221, proposing various amendments to Part 302, the Board's Rules of Practice in Economic Proceedings, and Part 300, the Board's Principles of Practice. This rule-making proceeding was instituted as a direct result of the Board's opinion and order in the New York-San Francisco Nonstop Service Case, Docket 9214, which was adopted November 19, 1959, and which denied or dismissed portions of certain petitions for reconsideration of TWA and United in that proceeding urging that the certification of American for the third nonstop service between New York and San Francisco be set aside on the ground that American and certain cities in that proceeding engaged in ex parte activities in violation of the Board's Rules. In that opinion the Board stated that in view of the various problems of interpretation and application of the Board's Rules which became apparent in the nonstop proceeding, the Board would undertake a prompt rule-making reexamination looking toward the modification and clarification of its regulations.

On December 1, 1960, the Board adopted Amendment No. 23 to Part 302 of the Rules of Practice, now known as Regulation PR-44, which made certain amendments to Part 302.14 of the Rules of Practice, commonly known as Rule 14. On the same day the Board adopted Amendment No. 1 to Part 300, the Board's Principles of Practice, now known as Regulation PR-43, which made extensive revisions in the Board's Principles of Practice. Both Regulation Nos. PR-44 and PR-43 became effective on December 6, 1960. Moreover, on December 1, 1960, the Board issued a further Notice of Proposed Rule Making in Docket 11221, identified as proposal PDR-4, which contemplates further revisions in Rule 14 of the Rules of Practice.

Rules of Practice. - As in the case of other regulatory agencies with similar functions, that part of the Board's Procedural Regulations governing the conduct of adjudicatory proceedings is a complex compendium of frequently amended and sometimes confusing rules. It is a brave practitioner before the Board who will say with real assurance that he really knows what each rule currently means. For stronger reasons, the lay officials of an air carrier, the public officers of a civic party and various representatives of the State and Federal governments, including Governors and Members of Congress, are also likely to have difficulties with the interpretation and application of specific rules set forth in the Board's Rules of Practice. Such difficulties are compounded when the Board's normal practice has departed from the specific language of a particular rule -- as indeed such practice has in permitting Congressmen to participate at oral argument under the last sentence of Rule 14 as set forth in Appendix B attached hereto.

Sections 401(c) and 401(g) of the Federal Aviation Act specifically grant interested person an unqualified right to file with the Board a "protest" or "memoranda" in opposition to or in support of any application for the issuance of a certificate or an amendment of a certificate of public convenience and necessity. Insofar as this right relates to the filing of pre-case communications -- i.e. communications prior to the activation of an economic proceeding -- the Board has never purported to prescribe or limit in any way that right in its procedural rules and principles of practice.

There is no specific indication in the Act of the status of such "protest" or "memoranda" or what consideration or disposal should be made of them by the Board. The legislative history of the Act is of no help. Definitions offer but little clarification.[82] Turning to the principles of statutory interpretation, it is an elementary rule that the statute should be construed so as to give meaning and effect to every part of it.[83] To construe the "protest" and "memoranda" sentence of sections 401(c) and (g) simply as an authorization to interested persons to correspond with the Board would appear to constitute deprival of the effect of the sentence, because it has long been conceded that any person may correspond with a government agency without Congressional authorization. However, there seem to be two possible interpretations which can give this provision force and effect. One is that the "protest" or "memoranda" were intended to constitute evidence; the other that they were intended to be statements to the Board on the merits of pending procedures or briefs to the Board on the merits of pending applications.[84]

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[82] In Webster's New International Dictionary (2d Ed.) a protest is defined as "A solemn declaration of disapproval of, or lack of full consent in complying with, a law, a demand, etc." and a memorandum is defined as "An instrument drawn up in a brief and compendious form" or "an informal communication."

The bulk of the material that has been coming to the Board in certificate cases over the years under section 401(c) has consisted of resolutions of civic organizations and letters from individuals, public officials, or business firms along proposed airline routes stating their desires for the service, their prospective uses for it and their preferences for one applicant or another. Such declarations do not come within any of the conventional exceptions to the hearsay rule and could not be received as evidence in certificate proceedings in the absence of agreement or stipulation by all parties. The alternative interpretation is that the sentence in question of sections 401(c) and (g) is an authorization for interested persons to submit statements to the Board on the merits of pending pre-case procedures, or briefs to the Board on the merits of a pending proposal after hearing.

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[83] Sutherland "Statutes and Statutory Construction" 2d Ed. (1904), section 380, with numerous authorities therein cited.

[84] It might occur that a third way of giving the sentence in question some effect would be to consider the protests or memoranda as pleadings in the form of petitions for intervention, but this could not be justified by a fair use of the language in the text nor in the light of the adequate consideration given to intervention by section 1009 of the Act.

Now, no party to this reopened inquiry has taken the trouble to research the legislative history of Rule 14 to see whether that Rule was intended to implement the "protest" and "memoranda" sentences of sections 401(c) and (g), either by way of preamble or by the specific terms of the Rule. Prior to December 6, 1960, which is the effective date of the most recent revision of Rule 14, this Rule provided, as it still does, that non-parties may present relevant evidence at hearing; cross-examine witnesses with the consent of the person presiding at the hearing; and present to both the Examiner and the Board a written statement on the issues involved in the proceeding. The Rule obviously intended that such latter statements be filed and served as a formal paper. Finally, the last sentence of Rule 14 provided that a representative of any department, agency or branch of the Federal government or of any State government may appear and present oral argument before the Board. The Board has consistently taken the position that under the latter provision Members of Congress could appear and participate in oral argument, whether in person or through a personal representative or by means of writing a statement or letter. 85/

85/ The Board has taken the position described above in spite of the fact that it is doubtful whether a Congressman presenting the views of his constituents to the Board is a representative of Congress or any other branch of the Federal government. But, as hereinafter shown, the Board has recently proposed a new Rule limiting oral argument to parties who have participated in the proceedings before the Examiner.

The predecessor section of section 302.14 which was in effect at all times relevant to the litigation of the nonstop case was section 302.6 of the 1949 revision of the Rules of Practice in Economic Proceedings. The latter Rule became effective on July 1, 1949. The 1949 version of the Rule permitted any person, including any State or other public body, to appear at a hearing and present relevant evidence. It further provided that such persons could suggest questions to be propounded by the government's counsel to witnesses called by other persons and, with the consent of the officer presiding at the hearing, cross-examine such witnesses directly.

Subsequently, the Port of New York Authority requested the Board to amend this provision to authorize non-parties to present a written statement on the issues in lieu of formal intervention. At that time, the Rules did not prohibit the filing of such statements and in route cases the Act specifically authorized them. However, the Board believed it desirable to extend this statutory privilege to all formal economic proceedings and to clarify the rules. Therefore, it adopted Amendment No. 2 to Part 302, effective August 1, 1952, which added the following language: "In addition, such persons may present to both the Examiner and the Board an oral or written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board." (Emphasis supplied). This amendment inadvertently authorized all non-parties to present oral argument to the Board, and it did not reflect the Board's policy of limiting oral argument to formal parties and to Congressmen.

In order to remedy this error the Board adopted Amendment No. 3 to Part 302, effective May 1, 1953, which limited the participation of non-parties in oral arguments to representatives of any department or agency of the Federal government or of any State government, including a State aviation commission. As already indicated, the latter provision has been consistently interpreted by the Board as permitting Congressmen to participate in oral argument.

In the various revisions of the Rules of Practice through the years since the enactment of the Civil Aeronautics Act of 1938, the "protest" and "memoranda" provisions of section 401 of the Act are only mentioned once. This one reference is made in the preamble to Amendment No. 2 to Part 302 of the Procedural Regulations, which amendment was enacted at the instance of the New York Port Authority and became effective on August 1, 1952.[86/] The preamble reads as follows:

> "The present section 302.14 of the Procedural Regulations provides for participation in hearings in economic proceedings by persons not parties by appearance at a hearing and the presentation of evidence relevant to the issues. However, the section does not now contain any provision which specifically permits persons not parties to file with the Board a written statement of their position. The Port of New York Authority has requested the Board to include such a provision in section 302.14. It is asserted that the inclusion of such a revision would relieve many parties from the burdens of formal intervention and could also result in a saving of time to the Board. Upon consideration of the application, we concur in these views. Although the Act now gives a statutory right to file a protest or memorandum of opposition in a proceeding under section 401, this right does not extend to all Board proceedings. Consequently, some procedural regulation is necessary to make clear that a written statement in lieu of intervention may be filed in any Board economic proceeding."

The foregoing amendment of Rule 14 allowed persons or organizations wishing to avoid the burdens of formal interventions to file a written statement on the

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[86/] Regulations Serial Number PR-16.

merits of a proposal before the Examiner and the Board after hearings in all economic proceedings except economic enforcement cases. But the Board made no finding that Amendment No. 2 of August 1, 1952, was intended as an implementation of the "protest" and "memoranda" provisions of sections 401(c) and (g) of the Act. On the contrary, the language of the preamble quoted above makes clear that the aforesaid Amendment No. 2 to Rule 14 was an extension of the statutory filing rights under sections 401(c) and (g) and not an implementation or clarification thereof.

The provision as to written statements could not be construed to govern the "protest or memorandum of opposition to or in support of the issuance of a certificate" language provided for in the statute. The statutory provision is a special one dealing with certificate applications -- not a general provision for all economic proceedings as is Rule 14 -- and, especially when read in context, obviously contemplates a right to file protests or supports at any time, including the time prior to the setting of the case for hearing -- not, as in the case of the statement contemplated by Rule 14, a formal brief based on a record made up at the evidentiary hearing.

As a result, the Board's regulations as revised in 1952 left a big hole or a no man's land whereby numerous pre-case communications continued to flood the Board offices in every major new route proceeding on the subjects of severance, activation and expedition of new route applications without control by any specific rule under which they were to be filed. If these communications have had any sanction in law or regulation at all, they must have been considered filings under sections 401(c) and (g) as communications on the merits of procedural matters pending before the Board.

The view that such pre-case communications have been properly receivable under the aforesaid sections 401(c) and (g) is confirmed by the fact that the Board acted on December 1, 1960, to plug, at least in part, the hole or no man's land of uncertainty which existed prior to that date regarding the inauguration, activation and expedition of proceedings. The Board then added, effective December 6, 1960, a new section to Rule 14 providing specific machinery for the filing of "requests for expedition" of proceedings and answers in support of, or opposition to such requests. The new section requires service of such requests and answers "upon all parties to the case" as provided by Rule 8 of the Rules of Practice. The Board took this action as a direct result of the situation revealed to it in the nonstop proceeding under Docket 9214. It made no finding that this new addition to Rule 14 in any way implements the "protest" and "memoranda" sentence of sections 401(c) and (g) of the Act.

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The Board's conference with representatives of San Francisco, and approximately 70 percent of communications in the correspondence file of Docket 9214, occurred in the period prior to the activation of the nonstop proceeding on January 13, 1958. The communications and the conference did not and could not violate the Board's Rules of Practice for those Rules do not purport to cover such communications to or conferences with the Board prior to the time a case has been set for hearing. The Board's recent amendment of Rule 14 covering requests for expedition is a step in the right direction, but the revised Rule is inadequate in that it fails to provide for a simple and reasonable procedure for the service of such requests. Additionally, the Board's Rules of Practice need to be further amended to cover service of applications filed with the Board, notice by the Board of such applications, and necessary standards and procedures for the severance of applications and priority of hearings on particular proposals.

Up to now, at least, there has been nothing improper about the informality of the procedures with the Board before a case has been activated. As a matter of fact, the most recent expression of Congressional interest in the problem of ex parte contacts, H. R. 12731, introduced by Representative Harris on June 21, 1960, requires judicial formalities to be observed by agencies and litigants before them only after the time a proceeding has been noticed for hearing.

These informal procedures did not in any way contravene the Board's procedural regulations existing at the time of the nonstop case. The Board's Rules of Practice did not set forth any procedures which must be followed when a hearing is being requested. Furthermore, contrary to the arguments of TWA and United, there was no requirement of service upon them of the communications to the Board requesting a hearing. Rule 8, which provides for service of documents filed with the Board, states that a document "shall be served . . . upon all parties to the proceeding in which it is filed . . . ." However, Rule 15 (d) provides that a person becomes a party only when he has been granted intervention in a proceeding. In the nonstop case, prior to January 1958, TWA and United had never sought, much less been granted, intervention in Docket 5903, the docket of American's application containing its request for New York-San Francisco nonstop authority. Accordingly, they were not parties to any "proceeding" and nothing filed with the Board in 1957 relating to Docket 5903 was required to be served upon TWA or United.[89]

TWA and United can scarcely be heard to argue that there was any impropriety in anyone's failing to make service upon them of documents filed before they intervened, for they themselves followed the same course as others having putative interests in the San Francisco-New York nonstop matter but who, like TWA and United, had not yet attempted to become parties. Thus, when TWA and United answered Americanb motion for expedited hearing, neither carrier purported to serve its document upon Eastern Air Lines -- a New York-San Francisco applicant at the time though its applications were not prosecuted in the nonstop case -- or upon other possible intervenors such as the New York Chamber of Commerce, to name only one of many civic bodies that had an interest in the matter and might have intervened had they chosen to do so. In almost any prospective Board proceeding the list of persons who have an interest and might become parties if they choose, is lengthy indeed, and hence it is incumbent upon those who want to receive service of documents concerning any particular application to intervene in the docket containing it. The Board's Rules of Practice at the time of the nonstop proceeding cannot reasonably be interpreted otherwise, nor were they by TWA and United in their filings, as noted above, nor have they ever been heretofore in any new route proceeding.[90]

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[89] Rule 18 does state that a request for an order or ruling by the Board not otherwise specifically provided for in the Rules of Practice shall be made by motion. But to label such a request a "motion" does not add any service requirement if, as here, no one has yet intervened as a party in the docket to which the request or motion relates. American and San Francisco served their May 1957 motions on TWA and United, but they were not required to do so by any Board rule.

There was only one instance after the activation of the nonstop proceeding of a direct ex parte communication to the Board from a party to the case. That sole instance was a telegram from the Mayor of the City and County of San Francisco dated June 23, 1958, urging that the hearings in the nonstop matter be concluded in July 1958. The Mayor's telegram of June 23, 1958, dealt entirely with a matter of procedure. Communications of the latter sort are commonplace in Board new route proceedings. There are many instances of such communications in other cases urging expedition in the hearings; in other instances they urge expedition of the Board's final decision after the hearings have been concluded. Such requests for expedition are now of course covered by the recent amendment of the Board to Rule 14.

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[90] It is true that the Chairman labeled Mayor Christopher's letter of July 3, 1957, a petition for reconsideration of the Board's denial of American's motion, and complained that the Mayor had failed to serve it "upon the parties to the case." But the Chairman did not point out who these "parties" were, and this letter scarcely changes the fact that there were none. Certainly the Chairman never made a similar complaint about any of the other numerous communications

TWA takes the position that American violated the Board's Rules of Practice in several respects through indirection. Thus, in its activities in support of its motion of May 3, 1957, for severance and an expedited hearing, American is alleged to have violated the requirement of Rule 18 that "any affidavits or other evidence desired to be relied upon" in support of an answer must be incorporated therein and that American ignored the requirements of the same Rule that answers in support of (or in opposition to) a motion must be filed within a stated period.[91]

At the outset, it must be made clear that no Board Rule has in the past precluded any air carrier applicant in a Board proceeding from fully acquainting all interested persons with the facts and merits of its application. Similarly, the Board has always recognized the right of an applicant to seek support of other parties to a proceeding if such support was sought within the confines of the Board's rules.

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[91] In the nonstop proceeding, the cutoff date for the filing of answers to American's motion was May 14, 1957; but the Board on May 10, 1957, extended the date at United's request to May 28, 1957.

The answers to American's motion submitted to the Board by the Port of New York Authority and the Chamber of Commerce of San Francisco were properly and seasonably filed. The answer filed to the same motion by the Oakland Chamber of Commerce was dated May 27, 1957, but it was not received by the Board until June 3, 1957. While American solicited support from the Oakland Chamber of Commerce for its motion, there is no evidence of record to support the charge that the carrier was responsible for the late filing by the Oakland Chamber of Commerce. This Chamber has long participated in Board proceedings; it is well acquainted with the Board's Rules of Practice; and its failure to file an answer in time was its own responsibility. Again, if the Board had been conscientious about enforcing its Rules of Practice it would have returned the answer filed by the Oakland Chamber of Commerce as having been late filed; but the Board's acceptance of the communications of May 27, 1957, from the Oakland Chamber of Commerce was consistent with its long-standing policy of accepting requests for expedition of proceedings from organizations having a potential interest in a new route matter as well as from persons who are unlikely to become parties without regard to any Rule of its Rules of Practice.

While American did engage in a campaign of solicitation of support for its motion, neither the persons that actively became parties nor the non-parties which filed documents with the Board after the filing of the motion were beholden to the carrier for such communications. It must be emphasized at this point that the municipalities in the Bay and New York areas and the numerous civic organizations at either end of the proposed nonstop route were not neophytes in their associations with air carriers in new route cases and in communicating with the Board either directly or through their Congressmen in new route proceedings. These organizations simply followed a long-standing practice of writing directly to the Board or writing to their Congressmen who in turn communicated with the Board.[92] To the extent such communications can be described as "answers" to American's motion of May 3, 1957, such communications have never heretofore been monitored or controlled by the Board to make sure they technically observed the Board's Rules of Practice as to either form or content.

American continued solicitation of support for an expedited hearing after the denial of its motion on June 26, 1957, and its contact with various non-parties and Members of Congress with regard to oral argument before the Board is more appropriately the subject matter of a possible violation of the Principles of Practice of the Board. The latter problem is essentially one of what constitutes permissible solicitation of community and Congressional support on matters pending before the Board. To the extent there were solicitations by American of communications to the Board prior to the activation of the nonstop proceeding, it has already been demonstrated that the Board has not had until the recent revision of Rule 14 any established procedure under which such communications could be monitored and received by the Board under a specific Board Rule. The carrier's solicitation of interest in oral argument through non-parties has likewise not been circumscribed in the past through an appropriate Board Rule. The proposed further revision of Rule 14 now pending should, if eventually adopted and thereafter enforced, properly bar non-parties from oral argument and obviate the need for the kind of electioneering that has been going on among Members of Congress in all major new route cases.

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[92] The private individuals who wrote to Members of Congress or to the Board regarding the nonstop proceeding likewise followed the time-honored practice of "writing their Congressman" or "writing to Washington" to make their views known. No Board Rule of Practice was violated by such common ex parte expressions of interest because no Rule of the Board purported to cover them.

Following the close of the hearing in the nonstop matter, the San Francisco Chamber of Commerce, with the knowledge of the City Attorney's office of San Francisco, undertook to secure expressions of support for the third nonstop route from local government bodies and chambers of commerce in Northern California that had not appeared at the hearing through a request that such bodies file statements with the Examiner under Rule 14. No decision to follow this course was reached until after the hearing was closed. Miller of the San Francisco Chamber of Commerce discussed the propriety of such a procedure with Needles of the San Francisco City Attorney's office and these two men agreed that such filings under Rule 14 were permissible. As had been done in many other new route proceedings, Examiner Bryan accepted statements for the record under Rule 14 of numerous municipalities and civic groups which had not appeared at the hearing.

The record is clear that American was not in any way responsible for Miller's solicitation of the Rule 14 statements after the close of hearings. While Miller did consult with Needles as to the propriety and permissibility of the procedure, San Francisco was likewise in no way responsible for Miller's activities in this regard.93/

93/ In circulating the proposed draft of a statement under Rule 14 to government units and chambers of commerce in the Bay area, Miller's accompanying letter was careful to call attention to Rule 14 and the Rule's provisions with respect to form, content, service and time of filing.

There can be general agreement with TWA that the interpretation of Rule 14 as it existed at the time of the nonstop case to the effect that for a person or organization to qualify to submit a written statement to either the Examiner or the Board, such person or organization must have appeared and presented his statement at the hearing. However, this has not been the practice of either the Board or the Board's Examiners in new route proceedings. Statements on the merits of new route proposals have generally been accepted by Examiners in lieu of briefs from persons who had not appeared at the hearing. Similarly, the Board has had a consistent practice of accepting such statements from municipalities and various civic or trade associations after the Examiner's Initial Decision.

With respect to American's contact with Members of Congress, either directly or through travel agents for the purpose of having Congress appear at oral argument or to write to the Board in lieu thereof, the activity in question is almost wholly related to a possible violation of the Board's Principles of Practice rather than the Board's Rules of Practice. It is true that permitting Congressmen to appear at oral argument or to submit a written letter or statement in lieu of physical appearance at argument appears to constitute a violation of Rule 14 as it existed at the time of the nonstop proceeding. However, the Board has consistently allowed Congressmen to appear at oral argument under that Rule either in person or by a representative or by written statement or letter. Accordingly, American cannot be held to have violated Rule 14 in soliciting the submission of either oral or written argument by Members of Congress in the nonstop case.

There is no allegation of the violation of any Rule of Practice by American in the filing of the many documents submitted by the carrier in the course of the nonstop proceeding. In the filing of its own papers, the carrier scrupulously observed the Board's Rules of Practice in all respects in the course of the litigation in the nonstop case.

In view of the foregoing and all considerations of record, it is found and concluded that neither American nor the City and County of San Francisco violated any of the Rules of Practice in Economic Proceedings during the course of the nonstop proceeding in Dockets 5903 and 9214. But the facts relating to the alleged violations of the Board's Principles of Practice by the two parties do not free the parties from blame with respect to the latter Rules.

Principles of Practice. - The Board's code of ethics or the standards of practice, as attached hereto in Appendix B, preclude "private" communications on the "merits" in cases "to be determined after notice and hearing," and further declared it to be improper for any person to attempt to bring pressure on the Board in such cases. These principles adjure, in their own words, the "highest standards of judicial and professional ethics." They insist that, in adjudicatory matters, "the Board's judicial character be recognized and protected."

While the Board's standards of practice in effect at the time of the nonstop proceeding appear simple and forthright in their terminology, these standards suffered from numerous built-in ambiguities and contradictions. Cognizant of a serious need for clarifying and amplifying its code of ethics or standards of practice, the Board made effective on December 6, 1960, by Regulation No. PR-43 wholesale revisions in those Rules as a result of the rule-making proceeding instituted on March 18, 1960, in Docket 11221.

The Board received comments and suggestions from 49 practitioners before the Board during the course of the rule-making proceedings in Docket 11221. The proceedings in Docket 11221 disclosed a marked divergence of views as to the proper scope of any ban on ex parte communications in Board procedures. Particularly troublesome were the twin problems of Congressional appearances at oral argument and the extent to which air carriers should be permitted to solicit support for their proposals from civic parties to a proceeding. With respect to the phrase "ex-parte communication" and the term "pressure," there have long been differences of opinion in many areas, including the definition of the terms themselves.

To start with, it must be borne in mind that regulatory agencies are not courts, notwithstanding that some major aspects of their duties involve what may be termed as judicial or quasi-judicial functions. As in the case of other regulatory tribunals, the Board is presumed to be an expert in its particular field of activity, a status acquired only by a thorough knowledge of the industry. Moreover, the Board must deal on a day-to-day basis with the manifold aspects of the airline industry which it regulates, in terms of the administration of the regulatory statute, prescription of rules, and case-to-case adjudications. Accordingly, there cannot be as to all the functions of the Board the same isolation from discussion and public and industry contacts which normally characterize a good court of law.

It has been widely recognized in recent years by students of the administrative process, by various bar groups devoting their time to the problem of the desirability of more judicialization in the administrative process and by various committees of the Congress working with the same problem that the various regulatory tribunals are not as yet regarded as courts.[94] Apart from the question of the desirability for such regard, the regulatory agencies in the past have experienced great difficulty in preventing communications to them from non-parties with respect to the many judicial matters pending before them, although it must be conceded that the various regulatory agencies could have done more in proscribing the incitement of active pressure campaigns on the part of units of the industries which are subject to the direct jurisdiction of the agencies. Further, there has been a widespread belief that spontaneous communications to a regulatory tribunal from non-parties are not entirely improper and cannot be wholly controlled, and that indeed it is no doubt desirable for the regulatory agencies to be aware of and responsive to public opinion, in contrast to being responsive to private interests attempting to assume the guise of public opinion through direct or indirect pressure campaigns of various kinds.[95] Additionally, there obviously are many inquiries and communications, oral or written, which neither constitute attempts to exert pressure nor can be considered communication on the merits. These include requests and communications from persons who need the information in the discharge of their own duties such as answering information requests received by the White House, Members of Congress, Governors of States, Mayors of cities, and departments of Federal, State and local governments. While the Board has not seen improprieties in such inquiries in the past, it nevertheless has had a policy of placing such communications in the public correspondence docket of the matter to which they related to avoid any suggestions of impropriety in receiving "private communications."

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[94] For an excellent discussion of the problems involved in the judicialization of the administrative process in the light of some of the current dissatisfactions with the administrative exercise of judicial power, see, Auerbach, Should Administrative Agencies Perform Adjudicatory Functions? 1959 Wis.L. Review 95.

[95] Even here there may be some room for difference of opinion as to the circumstances in which a litigant may legally "take his case to the public." Moreover, the Board has long held it unobjectionable for an air carrier to attempt to enlist the support of Members of Congress, cities, chambers of commerce and other civic groups. See, for example, letters of Chairman James R. Durfee dated October 30, 1959, February 17, 1960 and April 7, 1960, respectively, on this latter subject in the Southern Transcontinental Service Case, Docket 7984. These letters of Chairman Durfee's are found in the correspondence docket of that proceeding and ruled on protests of certain of the applicants of that case with respect to the activities of a competing applicant.

On the other hand, deliberate attempts at personal influence as such to achieve a particular result in an adjudicatory proceeding are in an entirely different category, as are private audiences with litigants or their attorneys, "back door" or clandestine contacts through third persons, unusual hospitality, as well as private or ex parte communications on matters which should be determined on notice to all of the litigants made parties to a particular proceeding. With respect to pressures and ex parte communications to exert such influence, it is universally agreed that it is wholly improper to attempt to obtain favorable recognition solely on the grounds of personal or political influence, through fear of retaliation of some kind or another or by otherwise exerting pressures as such in furtherance of private goals. There is likewise universal agreement that regulatory agencies should not succumb to such attempts at influence and further should discourage and prevent such attempts in every way possible.[96]

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[96] "In the last analysis, the quality of justice depends upon the quality of the men who administer it . . . ." Auerbach, 1959 Wis. L. Rev. 116.

But determining just what constitutes such attempts at improper pressure or influence is quite another matter in many circumstances. Persons occupying high places in business or government or otherwise deemed to be influential, whether in or outside the government, should not perhaps in all cases be barred from expressing or having considered their legitimate interests merely because they are influential. If, for example, another government department, official, or a Member of Congress has a proper interest on the merits of a given Board matter or contemplated action, the Board in the past has perceived no impropriety in that interest being communicated to it through customary and normal channels.[97] And if such channels are provided by an agency, they should generally be the same for all persons, whether they work in the White House, are Members of Congress, Federal, State or local officials or are just a plain Mr. Citizen in any part of the country. In other words, if what are generally termed ex parte communications or discussions may have been considered proper in the past in relationship to a given subject matter, they should not become the less so merely because of the identity of the individual involved. Similarly, if, as has been the Board's practice in the past, the area is one in which all representations by persons outside of a case should be publicly made, ex parte communications to or information from Board sources can be justified only under the normal concepts of withholding information which should not be released to others than properly interested Federal officials or because of security or other valid considerations. All of which leads, of course, to the very difficult question of the kind or types of situations in which ex parte or private communications must be held to be outside the bounds of propriety in this reopened proceeding.

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[97] There are now and no doubt always will be borderline cases and considerable differences of views in various quarters as to whether it is in fact a legitimate interest on the part of the communicant or whether more is intended than the expression of legitimate interest. These are problems which are inherent in the very natures of the subject involved, and involve questions such as whether Members of Congress should take a position on the merits or even on procedures, or whether other agencies or officials should do so. These are matters which heretofore have been thought to be largely beyond the Board's control. This problem is not so much communications as such, but rather the way in which they are made. It is the surreptitious, clandestine or "back door" approach in such cases which is reprehensible.

At the time the Board ruled on the allegations of TWA and United in its opinion and order of November 19, 1959,[98] the Board found that, in their most unfavorable light, some of the communications which came to it during the litigation of the nonstop proceeding might have constituted a technical violation of its standards of practice, but that they are wholly different in character from the type of private, clandestine - and even worse - activities involved in the "influence" cases before the Federal Communications Commission. This reopened inquiry has not revealed any significant communications to the Board which were not duly filed in the public correspondence dockets of the nonstop proceeding.[99] Now as before there is not the slightest hint of venality or corruption, private, secret or clandestine activities or premeditated wrongdoing on the part of any of the parties to the nonstop case, or on the part of any staff member, Examiner or Board Member, as there was in the cases recently before the Federal Communications Commission.[100]

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[98] Order E-14664.

[99] One of the communications sent to the Board but missing from the correspondence file was Mayor Christopher's letter of January 30, 1959, sent to the Governor of California, the two Senators from the State of California and numerous Members of the House of Representatives from the State of California. This letter was transmitted to the Board by two Members of Congress from California but the Mayor's letter was returned to the Congressmen at their request. The Mayor's letter of January 30, 1959, detailed the procedure delays referred to by the letters of the two Members of Congress from California which were placed in the public correspondence file. Certain other correspondence to the Board was returned to Members of Congress at their request, but no evidence was adduced during this reopened inquiry to enable the trier of facts to ascertain the nature of the remaining returned communications. With respect to oral communications by Members of Congress with Board personnel, the record in this reopened inquiry reveals no more than routine inquiries as to the procedural status of the nonstop proceeding.

In its November 19, 1959, opinion and order, the Board spelled out at some length the areas where its then existing standards of practice were unclear. It recognized that there was a serious question as to whether the prohibitions of its principles of practice applied to a procedure requesting the institution of an evidentiary hearing on a new route application. It further stated that there was also some question as to whether communications are "private" even when no confidential treatment is requested and they are made public as a matter of course in the correspondence file. Moreover, the Board then wondered whether communications are "on the merits" even though they - as do many of the letters in this proceeding - relate solely to matters of procedure or routinely transmit material without comment.

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[100] Six of the seven F.C.C. cases involved private communications with a Commissioner by an applicant, his agent, or persons with a direct pecuniary interest in the outcome of the case. Two of the cases have been decided by the Commission pursuant to Court remand: WKAT v. F.C.C., 258 F. 2d 418 (1958), on remand, In re applications of WKAT, Inc., et al., 29 F.C.C. 216 (1960) (private discussion between applicants and a Commissioner on the merits of the case and attempts to corrupt a Commissioner by two of the applicants); Massachusetts Bay Telecasters v. F.C.C., 261 F. 2d 55 (1958), on remand, In re applications of WHDH, Inc., et al., 29 F.C.C. 204 (1960) (private meetings between officers of two applicants and a Commissioner designed to influence the Commissioner's judgment on the merits). In two other cases, Initial Decisions have been issued by a Special Examiner: In re applications of Biscayne Television Corp., et al., 20 P&FRR 715 (1960), reopened by the Commission on its own motion (private approaches to a Commissioner by three applicants with intent to corrupt the Commissioner); Sangamon Valley Television Corp. v. United States, 358 U.S. 49 (1958), on remand, 269 F. 2d 221 (1959), on remand, 19 P&FRR 1055 (1960) (prospective licensee communicated with Commissioners both by personal visits and private letters and sent gifts to the Commissioners). Two other cases await consideration on charges that applicants privately discussed the merits with a Commissioner: WORZ v. F.C.C., 358 U.S. 55 (1958), on remand, 268 F. 2d 889 (1959); In re applications of City of Jacksonville, et al., reopened by the Commission on its own motion, 20 P&FRR 1087 (1960); see also Hearings on Investigation of Regulatory Commissions and Agencies before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 85th Cong. 2d Sess. 3260-3278 (1958). The seventh case, WIRL Television Corp. v. United States, 358 U. S. 51 (1958), remanded, 253 F. 2d 863 (1958), apparently was remanded because of an interrelationship with the Sangamon case. Moreover, the facts adduced in this reopened inquiry are unlike the willful wrong in an earlier F.C.C. situation as ruled upon in Communications Comm'n v. WOKO, 329 U.S. 223 (1946).

The Board then found, as it necessarily had to, that the "ambiguity" of its Rules may have resulted in doubt as to the standards of conduct required prior to the institution of the evidentiary hearing in the nonstop case on January 13, 1958. This finding is reinforced by the evidence adduced in this reopened inquiry as to American's and San Francisco's understanding of the Rules that were applicable prior to the institution of the hearing. Prior to the activation of the nonstop case on January 13, 1958, American acted on a view of the Board's Rules and standards of practice to the effect that before a matter had been set for hearing there was no fixed procedure for communications to the Board or for the service of such communications on other persons. American's activities after the start of the proceeding, insofar as they relate to the communications in the public correspondence file, were based on a view that it was entirely proper under the Board's Rules and code of ethics for carriers to advise Members of Congress and the municipalitie affected by their applications as to the nature of their proposals for new route authority; that it was entirely proper for carriers under aforesaid Rules and principles to solicit support from persons having a putative interest in a potential proceeding for an early hearing; and that it was likewise proper for carriers to advise Congressmen of the facts relating to a new proceeding which might be of substantial interest to their constituents. San Francisco's actions prior to the activation of the proceeding were governed by a view of the Board's Rules and standards of practice similar to that of American but independently arrived at.

Since it was not uncommon to hold conferences with civic groups similar in character to the Board's December 2, 1957, conference with the representatives of San Francisco, both American and San Francisco were of the mind that the informal conference of the Board with the representatives of San Francisco prior to the activation of the evidentiary hearing was entirely in accordance with the Board's Rules. Neither the City of San Francisco nor the carrier saw any impropriety in the carrier's close collaboration with the City in either the preparation of the City's papers requesting an expedited hearing or in the later preparation of the City's evidence to be presented at the hearing.

American likewise saw no impropriety in its press representative's numerous contacts with the daily newspapers of the Bay area, including the circulation of various background memoranda to the nonstop matter both before and after the evidentiary hearings. Finally, neither the carrier nor the City of San Francisco viewed the communications which came to the Board after the activation of the hearing as being repugnant to the Board's standards of practice, including several letters submitted by Members of Congress at the time of oral argument which, in several instances, were inspired or requested either by the carrier or by the City of San Francisco.

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In its December 6, 1960, revision of its code of ethics or standards of practice the Board clarifies its earlier definitions of the phrases "private communications" and "on the merits." In the same revision the Board has also established guidelines as to what constitutes improper solicitation in a proceeding on the part of a party and it further established at what stage in a proceeding the Rule concerning improper attempts to influence becomes applicable.

Both the preamble to the revised code of ethics or standards of practice and the changes made in the pre-existing Rules suggest that the recent revision of the Board's code of ethics is almost entirely preoccupied with the specific questions raised in the nonstop proceeding. The Board's revised standards of practice defines "a private communication on the merits" as a written or oral communication on "any substantive or procedural issue in the case" by any person, either in public or private life. Thus, procedural issues, including the issue of whether or not a proceeding should be activated or expedited, are now issues on the merits for the purpose of the Board's new Rule against private communications. But communications which merely make inquiry as to the status of a proceeding without discussing issues are not considered communications on the merits.

With respect to the issue of solicitation, the Board's recent revision of its standards of practice recognizes that its pre-existing Rules did not expressly prohibit parties from soliciting persons to support their positions either by their participation in the hearing or, in some cases, by direct communication with the Board. Recognizing that solicitation of support by an air carrier did not necessarily constitute an effort to bring pressure to bear on the Members of the Board or its staff, the revised Rules contemplate that such solicitation will continue to be proper if expressed within the framework of the Board's new procedural rules and its revised standards of practice. The Board, accordingly, wrote new language into its standards of practice which would make it improper for a party to any proceeding to engage in any activity which may reasonably be expected to result in communications to the Board or its staff in cases where such communications are not served upon all parties or orally presented at a hearing or oral argument. Additionally, the Board has established some guidelines as to what constitutes improper solicitation and the revised standards make it improper for any party to solicit communications to the Board or its staff other than proper communications by parties or non-parties specifically permitted under Rule 15 and the revised Rule 14 of the Board's Rules of Practice. Moreover, the revised standards of practice provide that any party soliciting the support of any person must call such person's attention to the provisions of Rules 14 and 15.

The revised standards of practice provide for a number of other changes. Among these further changes are several which have direct applicability to the problems raised by this reopened inquiry. Thus, with respect to matters required by the statute to be decided after notice and hearing, such as a proposal for new or additional air service, the revised standards are made applicable from the time an application is filed in a new route case. The amended standards of practice further state that where appropriate in the public interest the Board may deny a party which violates these standards of the relief it seeks in a proceeding. Moreover, requests for the activation of an expedited hearing on a pending new route application will henceforth be considered "a communication on the merits."[101] Finally, by a further Proposed Rule-Making proceeding instituted on December 1, 1960, the Board is considering a new amendment to its Rules of Practice which would withdraw from persons who are not parties to a proceeding the privilege of presenting statements or oral argument to the Board after the hearing before an Examiner is concluded. This latter proposed Rule would eliminate oral arguments to the Board now permitted by Members of Congress, spokesmen for the Federal executive departments or agencies and State aviation commissions. If the latter agencies were permitted to intervene as formal parties to a proceeding, they presumably would be entitled to orally argue before the Board even though they did not submit evidence at the hearing or otherwise participate in the proceedings before the Examiner.

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American and San Francisco must be judged in this reopened inquiry by the principles of practice which were in effect at the time of the litigation of the nonstop proceeding. In terms of specifics, just what did American and San Francisco do or attempt to do, if anything, which must be condemned as violation of the Board's code of ethics or standards of practice?

Approximately 70 percent of the allegedly offensive communications in behalf of American and San Francisco were received by the Board prior to activation of the nonstop proceeding on January 13, 1958. The findings of ultimate facts regarding those activities and communications will be presently stated.

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[101] As already noted herein, requests by non-parties for the activation or expedition of an application must hereafter be made in accordance with the Board's recently revised Rule 14 which provides for a new procedure whereby interested persons other than the parties may request that a proceeding be activated or expedited. Under the revised standards of practice, a request for activation or expedition of a proceeding which is not made in accordance with the Board's Rules of Practice will be placed in the public correspondence file of the proceeding and will not be considered by the Board.

American on May 3, 1957, and San Francisco on May 7, 1957, filed documents with the Board requesting an expedited hearing on American's proposal for a third San Francisco-New York nonstop route. These filings were made after consultation between representatives of carrier and officials of San Francisco. The carrier and the City worked in near unison on this project. After the filing of the papers requesting an activation of the nonstop proceeding, American and San Francisco sought supporting resolutions from various municipalities and civic groups in the Bay area. A number of resolutions and letters were sent by these civic organizations to the Board and to some Members of Congress from the State of California. The Mayor of San Francisco also wrote numerous letters to the Board on the alleged need for a new nonstop proceeding, and he and other officials of the City of San Francisco sought the support of various Members of Congress from California as well as support from California State officials and political leaders. American advised a number of Congressmen of its May 3, 1957, filing; but the carrier did not specifically ask the Congressmen to do anything at that time. Moreover, the carrier contacted a number of travel agents in the Bay area as well as some travel agents in the New York area regarding the carrier's efforts to have its application for the nonstop route advanced on the Board's docket. A number of the Members of Congress contacted by San Francisco, by other civic groups and by American wrote letters to the Board urging an early hearing.

American was in regular contact with the daily press of the Bay area after the filing of its request for an expedited hearing on May 3, 1957. The carrier inspired much of the newspaper publicity, both in the form of news stories and editorials, which appeared in the daily press of the Bay area following the filing of the carrier's request for a new nonstop proceeding. The Office of the Mayor of San Francisco made a collection of various newspaper editorials and articles supporting San Francisco in its endeavor to obtain an early hearing on the nonstop issue and a large number of such editorials and articles were transmitted by the Mayor of San Francisco directly to the Board.

San Francisco's efforts to enlist the support of various public officials, including certain Members of Congress, as well as the support of numerous civic groups in the Bay area, were consistent with the City's past practices in new route proceedings. While San Francisco consulted with representatives of American regarding such efforts, the activities and efforts of the City as well as those of other civic groups in the Bay area were not directed or dominated by American.

On June 26, 1957, the Board denied the request for an expedited hearing on American's application but it ordered a staff study of San Francisco-New York air service problems. Of the total 134 communications to the Board in the public correspondence file of the nonstop proceeding, 77 or almost 60 percent are dated between May 3, 1957, and June 26, 1957. TWA and United had direct notice of many of these communications.

There was nothing unusual about American's contacts with the officials of San Francisco, Members of Congress or the various civic groups in the Bay area, or in the carrier's efforts to interest public officials and civic organizations in the carrier's desire for an expedited hearing. Similarly, American's contacts with the press in connection with the nonstop case are not without precedent in Board proceedings, although the carrier's distribution of press releases and memoranda to editors to various newspapers in the Bay area was somewhat more intensive and better organized than the publicity efforts of other carriers which are of record in this case. Whether American's efforts at publicity for its cause in the nonstop matter transgressed the bounds of judicial propriety will be hereinafter analyzed in more detail. Further, there is nothing about the so-called ex parte contacts in connection with the nonstop proceeding that distinguishes it from a typical new route proceeding before the Board, either in nature or volume of such contacts. Indeed, the ex parte communications contained in the public correspondence files of other new route proceedings were in some cases even more vigorous in their demands for specific Board action than those which are found in the public correspondence docket of the nonstop case.

After the denial by the Board of the request for an early hearing on the nonstop issue on June 26, 1957, a member of the Board's staff visited San Francisco to discuss the San Francisco-New York air service problem with Bay area officials and other interested persons. The public correspondence file contains a total of 16 important communications to the Board during the period after denial of the request for an expedited hearing and prior to January 13, 1958, when the Board, by divided vote, ordered a hearing on

American's application. Among these communications were two letters from the Mayor of San Francisco -- both of which were sent to TWA and United -- and one from a San Francisco civic organization. There was a letter from an East Coast Congressman transmitting a letter he had received from a constituent. The remaining letters were from California Congressmen in response to communications received from the various public officials in the Bay area. All of the communications just noted urged early consideration by the Board of the San Francisco-New York nonstop matter.

In late November 1957, San Francisco sent its State legislative representative to Washington, D. C., to contact members of the California delegation regarding the City's interest in an early hearing. On December 2, 1957, representatives of San Francisco had an informal conference with the Board regarding the Bay area's air service problems. The proposed visit of the San Francisco representatives to Washington to meet with the Board was prominently reported in the San Francisco press. While representatives of American were in contact with the representatives of San Francisco both prior to and after the City's conference with the Board on December 2, 1957, the activities of San Francisco on or about the date of the conference with the Board were not suggested or masterminded by the carrier in any way. A transcript of the conference of December 2, was made available to TWA and United; both the carriers also had notice of the conference through the daily press in the Bay area as well as through a story appearing in a local trade journal.[108]

Following the activation of the nonstop proceeding by Board order on January 13, 1958, the case assumed an entirely new posture. During the period between the date of January 13, 1958 and September 2, 1959, when the Board issued its order granting American's application for the third San Francisco-New York nonstop new route, there is no question about the applicability of the Board's principles of practice proscribing "private communications on the merits" and "any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the Members of the Board or its staff, or that such person or any Member of the Board's staff, directly or indirectly, gives statements to the press or radio, by paid advertisements or otherwise designed to influence the Board's judgment in the case." Among other problems, the latter part of the proscription of the Board's ethical standards raises the thorny questions of the extent to which a party to a proceeding may legitimately solicit support for its case and the point at which a party's efforts at publicizing its case runs afoul of generally accepted judicial conduct.

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[108] Prior to the date of the conference with the Board on December 2, 1957, which was held at the request of certain Members of Congress from California, the Mayor of San Francisco wrote to some California Congressmen and included a so-called "Condensed Facts Sheet" summarizing the arguments supporting an early hearing. Although American had not suggested the Mayor should write such a letter, the carrier had provided the City with economic data on the San Francisco-New York matter as early as 1956. These data, in the form of a "Facts Sheet" were revised and brought up to date from time to time. A revised version of the "Facts Sheet" was given by the carrier to the San Francisco City Attorney's office with the knowledge that the City planned to make some distribution of it at that time. The transmittal of the "Facts Sheet" to the offices of the Board by certain California Congressmen and by the White House did not result from any specific request on the part of American.

A total of 40 some communications in the public correspondence file of the nonstop case are dated during the 19-month period after the activation of the proceeding on January 13, 1958, and prior to the Board's September 2, 1959 decision. San Francisco was in touch at least twice with Members of Congress from the State of California during this period to complain of procedural delays, and nine of the communications in the file during this period are letters from Congressmen reflecting San Francisco's expression of concern over the delays in deciding the nonstop case.

Although American was not directly responsible for these communications, one official of the carrier wrote a highly inflammatory though somewhat confused letter to a member of the Mayor's Committee of San Francisco complaining of the delay in the issuance of Examiner Bryan's decision in the nonstop matter. During this period the Board was unmercifully abused by various editorials appearing in the daily papers of the Bay area. Through ignorance, indifference or sheer irresponsibility, certain of the editorial writers for the daily press in the Bay area treated the Board as a sort of a political dummy to be whacked and kicked around at will. Their editorials showed scant understanding of the judicial processes under which Board new route proceedings are decided and even less appreciation of the proper relationship between a newspaper and a judicial tribunal charged with responsibility for anticipated or pending litigation. Indeed, certain of the editorials hereinbefore referred to hardly credited the Board with a minimum degree of intelligence and industry.

Illustrative of an almost complete lack of respect for the Board and its judicial processes on the part of certain Bay area newspapers was their gloating over the Board's reversal of January 13, 1958, on the issue of an expedited hearing on the nonstop matter and their editorial description of that reversal as a victory for San Francisco's "lobbying" and the Bay area's "political" leadership. It is a tribute to the Board's judicial detachment that it voted that reversal on the basis of its study of the problem in spite of the mistreatment it suffered at the hands of certain Bay area newspapers.

American was in almost constant contact with the daily newspapers of the Bay area both before and after the activation of the nonstop proceeding. The carrier's officials made elaborate plans for building up publicity in the Bay area upon the release of the Examiner's Initial Decision, with the carrier hoping that the full impact of such publicity would get to the Members of Congress and the Board. At least one editorial during the pendency of this case on the merits was transmitted to the Board by a California Congressman and another California Congressman brought a sheaf of news stories and editorials from the Bay area press with him to oral argument; but, as already found, the Chairman refused to accept the latter materials for the record.

The remaining communications in the public correspondence file during the January 13, 1958 - September 2, 1959, period are for the most part letters or statements submitted by Members of Congress, public officials in California and a number of private citizens. The correspondence file for this period contains two communications transmitting a resolution of the California Assembly on the nonstop matter. There are also a number of letters in the file during this period from Members of Congress making general inquiries as to the procedural status of the proceeding and transmitting letters received by those Congressmen from travel agents. A few letters also came from private citizens.

The record leaves no doubt that both American and San Francisco solicited some of the letters or statements submitted at the time of oral argument before the Board. American also solicited a number of travel agents in an indirect effort to encourage Congressmen to appear at the oral argument. There is no evidence that the letters which came to the Board from private citizens during this period were directly solicited either by San Francisco or American. It is to be noted, however, that TWA and United had direct notice of most of the Congressional letters and statements submitted at the time of oral argument and they heard the California Assembly resolution read aloud at the oral argument.[109/]

[109/] As previously found herein, the only instance of a direct contact by a party with the Board after the activation of the case and before Board decision was a telegram of Mayor Christopher of June 24, 1958, urging that public hearings be concluded in July 1958. The Mayor also wrote a letter dated January 30, 1959, to the Governor of California and Members of Congress from California expressing alarm over the alleged delay of Examiner Bryan's Initial Decision. If the Mayor hoped this letter would come to the attention of the Board, his hope came to pass. Two California Congressmen promptly relayed the letter to the Board.

Both American and San Francisco stoutly deny that they consciously violated the Board's principles of practice at any stage of the nonstop proceeding. Each of these parties to the proceeding insists it acted upon interpretations of the Board's Rules which were reasonably held, particularly in view of the Board's acknowledged uncertainties as to the meaning of very vital provisions of its pre-existing ethical rules of conduct, as well as the Board's past acquiescence in and even acceptance of similar extra-record activities in other new route proceedings. It is argued by American that holding the carrier and San Francisco accountable as violators of the Board's standards of practice would not only be harsh and unfair, but also would be contrary to the well established principle that one cannot be punished for violations of a rule when the conduct proscribed by the rule is not clearly defined. 110/ As a matter of fairness and even-handed justice, there is manifest merit in mitigating the consequences of the conduct of American and San Francisco under the ambiguous proscriptions of the Board's pre-existing standards of ethical practice. Such a finding has substantial justification in the failure of the Board to clarify its principles of practice at an earlier date and in its failure to take more action with respect to various improper practices in such proceedings as the New York-Florida Case, Docket 3051, and the New York-Mexico City Nonstop Case, Docket 2909, in each of which even more serious offenses to the judicial process are recorded.

110/ See, e.g., Kraus & Bros. v. United States, 327 U.S. 614 (1946); United States v. Cohen Grocery Co., 255 U.S. 81 (1921).

While the strictures of the Board's rules of ethical practice in effect at all times relevant to this reopened inquiry, particularly those of Rule 2 which, among other things, proscribed attempts at improper influence, could well be read to make them applicable to the important procedural question of getting a case started, such a reading does not jibe with the terminology of the unrevised rules. Before very recently amended, those rules prohibited private communications on the merits of a case to be determined after notice and hearing. It would appear that that prohibition applied to activities aimed at influencing the Board's judgment by off-the-record means in a case to be determined on the record and, accordingly, the prohibition may be held as inapplicable to the mass of communications reaching the Board prior to the activation of the nonstop proceeding. Moreover, the communications involved in the period prior to the activation of the proceeding, if not the activities behind them, appear to be expressly authorized by law in sections 401(c) and (g) of the Act. Even if this interpretation of the Board's standards of practice is in error, and those standards were intended to prevent ex parte communications to the Board with regard to procedural questions concerning applications before they have been set for hearing, there still would be doubt on the question of the violation of these principles because TWA and United did not even seek leave to intervene in the nonstop case until after the prehearing communications had been sent and received and the communicants were therefore under no obligation by Board rules to serve these carriers with copies of their submissions in any event. But regardless of the procedures or lack thereof relating to the activation of a proceeding as

established in the statute or in the Board's Rules, American and San Francisco must, as parties to an adjudicatory proceeding, account for activities and communications which ignored or transgressed the normally accepted standards of judicial conduct. Ambiguities in the Board's rules which were applicable prior to the activation of a proceeding may mitigate, but they cannot completely excuse, such transgressions.

Irrespective of the uncertainties in the Board's pre-existing standards of practice and the numerous unwritten modifications thereof born of customary practice of both air carriers and civic parties before the Board proceedings, and in spite of the Board's tolerance of flagrant extra-record procedures in other new route proceedings, the record made in this reopened inquiry cannot wholly excuse the numerous off-the-record activities of American and San Francisco in the nonstop matter. Viewing the nonstop proceeding as a whole, the vice in the activities of American and San Francisco is that each sought the intercession of non-parties to place the strongest kind of case in the Board's hands both on the important procedural question of an early hearing and on the final substantive question of the merits of the issues in the nonstop proceeding.[111] Whether the ambiguities in the Board's pre-existing code of ethics and the belief of American and San Francisco that longstanding practices of litigants before the Board have so legitimatized their activities so as to require a finding that their violations were only technical in nature is not important to a finding that the violations took place. The foregoing factors are only important to a possible moderation of the sanctions which should follow such violations.

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[111] As ruled during the hearings in this reopened inquiry, mere attempts at activities which are proscribed by the Board's code of ethics are sufficient to establish a violation thereof.

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In the case of American, its questionable practices consisted primarily of inspiring communications by travel agents directly and through Members of Congress, in soliciting Members of Congress to support its application at the time of oral argument before the Board,[112] and lastly -- and perhaps most seriously -- in attempting to influence the decision in the nonstop proceeding through a well-organized and efficient publicity program in the daily press of the Bay area. In the case of San Francisco, the core of its violations rests in its almost complete disregard of the judicial character of the Board's processes and in the City's well-organized and carefully directed "grass roots" campaign for a third nonstop carrier: first, to obtain an early hearing on the nonstop issue and; thereafter, to solicit support for a favorable Board decision. As part of this campaign, San Francisco virtually saturated the Board with direct communications on the need for an expedited hearing on American's application. The City solicited support for its position from almost every important available civic and political quarter in the Bay area. Included in the mass of materials sent directly to the Board by San Francisco were not only the direct communications of its Mayor representing a need for another nonstop service to New York, but his representations were supported by enclosures of resolutions of neighboring municipalities in the Bay area, by endorsements of various civic groups in that region, and by numerous newspaper articles and editorials which were obviously transmitted to the Board for the purpose of swaying the Board's judgment. San Francisco also inspired certain California State officials and various Members of Congress from California to communicate directly with the Board with respect to the nonstop matter.

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[112] In spite of the ruling of the Court of Appeals for the Second Circuit to the contrary in Eastern Air Lines, Inc. v. Civil Aeronautics Board, 271 F.2d 752 (1959), even the submission of oral argument by Congressmen, particularly when solicited by a private party, cannot be squared with sound rules and professional ethics. In view of the fact that these powerful political personages have not participated in the development of the record, advocacy by them can obliterate the appearance of fairness required in such cases. In the above case, the Board submitted a brief to the Court stating in effect that the Board pays no attention to arguments of Congressmen in adjudicatory cases. If that is so, why clutter up the record and use the Board's and its staff's valuable time in entertaining such arguments at all in any form and often acknowledging such arguments when they are presented in written form?

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Aside from the numerous off-the-record efforts of San Francisco during the long history of the nonstop case, perhaps the most disturbing aspect of the whole range of extra-record activities during the course of the nonstop proceeding have been American's efforts to employ publicity as a device for furthering its cause in the nonstop matter. * * *

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American contends in part that its use of publicity in this case is justified by analogy to the press releases issued by the Attorney General in anti-trust proceedings. A published opinion of the American Bar Association's Committee on Legal Ethics, issued soon after the press release practice was adopted by the Attorney General, lays at rest any such claim (Opinion No. 199, 26 American Bar Association Journal No. 3, pp. 233-234 (March, 1940)). It states in part:

> ". . . the Attorney General is attorney for the body politic . . . Herein lies a material difference between a report or a press release issued by the Attorney General, and one given out by an attorney for a private client. Notwithstanding this difference, certain limitations should be regarded in giving out press releases by the Attorney General respecting pending or prospective litigation in order that the rights of the defendants, both in civil and criminal prosecutions, be neither impaired nor prejudiced.
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> * * * * *
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> "While we may doubt that the effect of public opinion would sway or bias the judgment of the trial judge in an equity proceeding, the defendant should not be called upon to run that risk, and the trial court should not have his task made more difficult by any dissemination of statements to the public that would be calculated to create a public demand for a particular judgment in a prospective or pending case.
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> ". . . when, as here, the statements relate to prospective or pending criminal or civil proceedings, they should omit any assertions of fact likely to create an adverse attitude in the public mind respecting the alleged actions of the defendants . . ." 115/

American also produced evidence to show that American and other carriers have distributed press releases in judicial and other quasi-judicial proceedings. Whatever the propriety of those activities (and that is not in issue here) the

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115/ The force of the last two paragraphs from Opinion No. 199 quoted above may be contrasted with Barbour's activities in providing "memoranda to editors" and other handouts claiming "discrimination" against and inadequate service at San Francisco and even purporting to analyze for the press TWA's and United's exhibits in the proceeding.

whole problem of the uses of publicity in new route cases is deeply troublesome and one that must be faced up to in this reopened inquiry. Assuming arguendo that a carrier may publicize newsworthy matter, even though it comes to light simultaneously in a quasi-judicial proceeding, it cannot be concluded that all bans are removed and that the partisan "memoranda to the editors" and similar matters in this record become an acceptable publicity device in a new route proceeding.

The Board's principles of practice specifically prohibit any interested person from giving directly or indirectly statements to the press or radio by paid advertisements or otherwise designed to influence the Board's judgment in the case. Here again, it may be reasonably held that this prohibition applies only to statements issued during an on-the-record proceeding and is not applicable to the press releases and memoranda circulated by American prior to January 13, 1958. * * *

American's intimation that a finding condemning the carrier's press relations in the nonstop proceeding may amount to a "gag" rule prohibiting the issuance of appropriate information to the press is ridiculous. American's press releases and memoranda to the editors reflected the carrier's point of view in a colored and partisan way. While there is no showing in the record that the Board was aware of American's efforts at propagandizing the Bay area press or that the Board even read the numerous articles and editorials of certain San Francisco newspapers which carefully parrotted the carrier's insistent drumbeating on the need for a third nonstop carrier, a finding to the effect that the Board might have been swayed by the publicity efforts of American is not necessary to a condemnation of the carrier's practice in this regard. It is not really vitally important whether the Board was actually influenced by the carrier's careful efforts to propagandize its position with the public in the Bay area. The important thing is that the proceeding before the Board must give the appearance of affording justice to each of the parties involved. As the Supreme Court has observed "justice must satisfy the appearance of justice." Offut v. United States 348 U.S. 11, 14 (1954). In other words, by allowing parties in its new route proceedings to propagandize the Board through the medium of planted newspaper publicity, the Board's dignity and respect and judicial status is undermined regardless of the fact that parties to a case may nevertheless be given a fair hearing.

* * * * * * *

The publicity procedures in the nonstop proceeding are particularly disturbing because the Mayor of San Francisco and certain Members of Congress took it upon themselves to relay to the Board articles and editorials in the Bay area press inspired by American. It is true that American was not shown to be directly responsible for those transmittals, but what was most unprofessional concerning American's press activities was the fact that an officer of the carrier trained in the law specifically intended that the impact of certain of the carrier's publicity efforts would somehow reach the Board and Members of Congress. Certainly this officer of the carrier did not want such publicity in the Board's hands in order that the Members of the Board or its staff would have a mere exercise in the reading of newspaper articles and editorials. In view of the foregoing, it is concluded that American and San Francisco both transgressed the Board's ethical standards with respect to the use of newspaper publicity during the pendency of the nonstop matter. However, since what American and San Francisco did in this regard has to a substantial extent been a long established practice of both air carrier and civic litigants before the Board, the offenses of the carrier and the City against the Board's rules in this respect are mitigated by the Board's failure to enforce its longstanding rule against improper newspaper publicity in other Board proceedings.

We next come to the problem of whether the violations of American and San Francisco of the Board's principles of practice as set forth in the foregoing ultimate findings require a retrial of the San Francisco-New York nonstop proceeding.

The mere fact that there may have been some violations of the Board's code of ethics does not necessarily vitiate the prior proceeding. For that to be the case the violations must be shown to have been both substantial and prejudicial. Sangamon Valley Television Corp. v. Federal Communications Commission, 269 F.2d 211, 224-225, (D.C. Cir., 1959).[116/] The courts often set aside administrative determinations because of adjective rather than

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[116/] The significant recent court cases on this question do not stand for contrary rule. In each of the following, the failure to conform with the rules resulted in manifest prejudice: Service v. Dulles, 354 U.S. 363, 387-388 (1957 dismissal of Federal employee contrary to regulations; Jefferson Amusement Co. v. Federal Communications Commission, 96 App. D.C. 375, 377, 226 F.2d 227, 279-2 (1955), dismissal of application without hearing; Accardi v. Shaughnessy, 347 U. 260, 266-267 (1954), decision of Immigration Board ordering deportation of petitioner influenced by the Attorney General; American Broadcasting Co. v. Federal Communications Commission, 85 App. D.C. 343, 349, 179 F.2d 437, 443 (1949), mod fication of license without hearing; and United States v. Perkins, 79 F.2d 533, 534 (2d Cir. 1935), decision by an Examiner who had not sat on the case.

substantive error. But the procedural irregularities complained of in such situations must be serious and prejudicial. Most frequently, such reversals involved patent deficiencies in the hearing or decisional processes of the regulatory tribunal.[117]

TWA has never really demonstrated how it was prejudiced by the activities of American and San Francisco except to state that the numerous ex parte communications which came to the Board were somehow inherently prejudicial because TWA had no opportunity to rebut them, and that, moreover, the activities of American and San Francisco as well as the communications inspired by them destroyed the appearance of that degree of fairness in the nonstop case which is required of all judicial and quasi-judicial proceedings.

United argues that the numerous off-the-record communications to the Board led the Board to hold a hearing before actual jet operations were available. This argument has in effect been disposed of by the Court. United Air Lines, Inc. v. Civil Aeronautics Board, 281 F.2d, 53, 55-56 (D.C. Cir. 1960). Moreover, United contends that the only effective remedy which can be directed as a result of this reopened inquiry to vindicate the integrity of the Board, its regulations and its processes, and the rights of the parties other than American and San Francisco in this proceeding, is a vitiation of the nonstop proceeding and a hearing de novo to determine whether the public convenience and necessity require that a third nonstop carrier be authorized between San Francisco and New York and, if so, which of any applicants for such authority should be authorized.

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[117] See, e.g., Morgan v. United States, 304 U.S. 1, 23-26 (1938); Channel 16 of Rhode Island v. Federal Communications Commission, 229 F.2d, 520, 524 (D.C. Cir. 1956).

With respect to the many extra-record communications received by the Board during the course of the nonstop case, the majority of such communications in the public correspondence file are dated between the filing of American's motion of May 3, 1957, and the Board's order of June 26, 1957, denying that motion. Quite aside from the fact that TWA and United knew full well that the Board was receiving communications from Congress and civic groups during this period, the Board denied American's motion as TWA and United had asked it to do, so they were scarcely prejudiced by such communications.

As for the conference of the Board with San Francisco on December 2, 1957, and the scattering of communications after the order which denied American's motion for an early hearing, and prior to January 13, 1958, when the Board, on its own motion, ordered a hearing on the nonstop issue, the conference and the extra-record communications in question were almost wholly directed to the question of whether or not there should be a hearing and were not prejudicial. TWA and United were not injured by the fact that the Board finally decided to hold a hearing after its staff had submitted a study of the San Francisco-New York air service pattern, for the mere fact that the hearing was ordered did not assure that a third nonstop carrier would be authorized. Nor can there be any really serious grounds for finding that the conference or the 1957 communications - most of which antedated the Board's final decision by more than two years - in any way affected the capacity of the Examiner and the Board to make a fair and honest disposition of the nonstop proceeding. Indeed, after the pre-case conference fiasco on the part of San Francisco on the alleged necessity of "pressure" upon the

Board as reported in the press prior to the conference, the Board became very skittish in dealing with the City on the nonstop matter. Significantly, two Members of the Board voted against the authorization of a third nonstop in the San Francisco-New York market. Although the dissent of those Board Members does not show that the tactics of San Francisco drove them to vote for a denial of the proposed third nonstop route, no one in a position of judicial responsibility could possibly take kindly to the constant barrage of communications sent or inspired by San Francisco and to the editorial abuse heaped upon the Board by the Bay area press.

* * * * * * *

It is difficult to see how United and TWA even can seriously claim that they were prejudiced or denied a fair hearing by the thin trickle of communications received by the Board during the 19 months that the case was actually in progress. The letters in June, 1958, from the Mayor of San Francisco, and from a few California Congressmen, requesting that the Board adhere to the procedural schedule established in the Examiner's report of prehearing conference were to no avail. The Examiner postponed the hearings in accordance with the request of United.

The letters from California Congressmen in February, 1959, urging expedition of the proceeding had no effect on the future course of the proceeding; there is certainly no suggestion that the Examiner was thereby prodded into speeding his decision. If TWA and United seriously thought that these letters had any such result, they were given every opportunity in this proceeding to adduce testimony to this effect; indeed, they were openly invited in this reopened inquiry to do so.

The only remaining communications of substantial significance are the statements submitted by public officials at the time of oral argument. Even were the Board to reverse its traditional position and find that these violated its Rules, there was still no substantial harm to TWA or United. Counsel for the two carriers heard the Chairman refer to some of these communications at the opening of the argument, but they did not object to the receipt of these communications nor did they ask to see them. They saw a Congressman hand the Chairman other of these communications, and still there was no complaint by TWA or United or any request that they be permitted to see the communications.

Finally, as to all the communications, any possibility of prejudice or denial of a fair hearing is put to rest by the Board's affirmative finding in its order of November 19, 1959, that it did not consider the communications in reaching its decision. Similar disclaimers have been accepted even where the extra-record communications set forth facts not of record which would bear critically on the issues in the case. See, e.g., Eastern Air Lines, Inc. v. Civil Aeronautics Board, 271 F.2d 752, 758 (2d Cir. 1959).

Cf. Sisto v. Civil Aeronautics Board, 86 App. D.C. 31, 35-36, 179 F.2d 47, 51-52 (1949). Here the communications did not set forth any significant facts which were not in the record, and were in the main the usual expressions of public interest from Members of Congress, from civic groups and from private citizens.

Perhaps the most important feature of the various off-the-record communications in the files of the nonstop proceeding as well as in the files of every other major record proceeding before the Board is the simple fact that such communications have for very obvious reasons positively no status in the decisional processes of the Examiners and the Board. Faced for years with the difficult problem of what to do with off-the-record expressions of interest, the Examiners and the Board have long caused such communications to be placed in the correspondence file of the dockets involved. These various so-called ex parte or extra-record communications are important and significant largely because of the nuisance and the trouble such communications cause the Examiners and the Board. If my experience as an Examiner in this matter is any guide, absolutely no attention is paid to such communications in rendering a decision on the record.[118]

* * * * * * *

In view of all that has been shown as to the Board's past interpretation of its regulations, and as to accepted and normal practices in other proceedings, it would be harsh indeed to hold that American is disqualified from retaining the nonstop right conferred by the Board's decision or to hold that its qualifications are in some way seriously impaired. The worst of offenses of American, i.e., solicitation of support and the use of publicity, - and the worst offenses of San Francisco, i.e., the constant badgering of the Board through ex parte letters, accompanied in some cases with various enclosures, the solicitation of support and the attempts at Congressional pressure -- each represent activities which in one way or another have for years been a blot on the judicial processes of the Board.

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[118] As a matter of sound judicial procedure, the fact that off-the-record communications are uniformly disregarded in the decisional process by the Examiners and the Board does not, of course, make such communications any less improper than they would be if they were considered.

American is a highly respected carrier in the industry and the record of its representation in prior Board proceedings has been as good as that of any of the other certificated air carriers. The carrier's responsibility for that portion of the correspondence file reflecting communications it inspired in the nonstop case is serious. But the consequences of these transgressions of the principles of practice must be mitigated by the fact that this is the general way in which air carriers have been trying large new route cases before the Board for years and by the further fact that the Board has held that solicitations of support of the type inspired by American were not improper. This is not to say that two or more wrongs make a right. But the ends of justice are not served by singling out one carrier for condemnation when equally opprobrious conduct on the part of others similarly situated is excused or ignored. No amount of righteous indignation on the part of TWA and United in this case can gainsay the normal practices of the industry with respect to Congressional contacts, solicitations of support from non-parties and the use of publicity to advance a carrier's cause in new route proceedings.

As already found, the circumstances of this reopened inquiry are in sharp contrast to the Federal Communications Commission cases in which the Commission has found that the activities of applicants in the WKAT and WHDH proceedings reflected adversely on their qualifications. In both of those cases, the Commission found evidence of private, clandestine attempts to influence the judgment of the Commission during a pending proceeding. In both cases it is clear that the applicants were consciously engaged in improper activities, and there had been great prejudice to other applicants. This reopened inquiry has failed to produce any improper demand - much less the slightest claim - by either American or San Francisco upon the conscience and judgment of any staff or Board Member in connection with any phase of the nonstop matter.

Furthermore, the F.C.C. cases would be dubious precedent for this reopened inquiry even if the same types of activity on the part of the applicants were involved, which definitely is not the case. In the F.C.C. cases the Commission faces the problem of determining the comparative qualifications of new and untried applicants, and the question of attempted impropriety on the part of an applicant bears importantly on that judgment because the successful applicant is to be trusted with a license to transmit pictures and words into the privacy of the home without prior censorship and with very little regulatory supervision. Moreover, the difference in the qualifications of the applicants for broadcast licenses and of the public service they can be expected to provide, is usually very slim. Hence, the attitude of the applicants toward the Commission and the personal morality of their principals assume a significance they could never have in the airline field.

In any event, in the present case there is no question of any corruption, "back door" contacts with Board Members or conscious misfeasance on the part of American or San Francisco, and the Board is dealing with a situation where the carrier accused of wrongdoing has, as the Board noted in its order denying the TWA and United petitions for reconsideration based on these charges, had a good record over many years of regulatory supervision.

Conclusions

There next follows conclusions which follow from the findings of ultimate facts. On the basis of all of the foregoing findings and all of the evidence of record, the undersigned Examiner makes the following conclusions:

I. It is found and concluded that no party to the original nonstop proceedings under Docket 9214 et al. before the Civil Aeronautics Board violated any of the provisions of Part 302 of the Board's Procedural Regulations, commonly known as the Board's Rules of Practice in Economic Proceedings;

II. It is found and concluded that the Port of New York Authority, the Port of Oakland and the Oakland Chamber of Commerce, and the San Francisco Chamber of Commerce did not at any time during the proceedings under Docket 9214 et al. violate Part 300 of the Board's Procedural Regulations, commonly known as the Principles of Practice of the Civil Aeronautics Board;

III. It is found and concluded that American Airlines, Inc., and the City and County of San Francisco, each individually and on its own, violated the Principles of Practice of the Civil Aeronautics Board, particularly Part 300.2 of the said Principles of Practice;

IV. It is found and concluded that the violations of American and the City and County of San Francisco of the Board's Principles of Practice did not prejudice TWA or United or any other party to the nonstop proceedings under Docket 9214 et al.; that said violations of the Principles of Practice of the Civil Aeronautics Board on the part of American and the City and County of San Francisco did not deny a fair hearing to TWA, United or any other party to the proceedings under Docket 9214 et al.; and that the record in this reopened inquiry fails to provide sufficient reason or justification for voiding or rescinding or setting aside of the order of certification made to American by Order E-14412, dated September 2, 1959, which authorized American to provide a third nonstop service between New York and San Francisco;

V. It is found and concluded that the Civil Aeronautics Board recommend to the United States Court of Appeals for the District of Columbia Circuit that violations of the Board's Principles of Practice on the part of American and San Francisco did not vitiate the nonstop proceedings under Docket 9214 et al. and that said violations on the part of American are not sufficiently grave to warrant disqualification of the carrier as the licensee for the third New York-San Francisco nonstop route;

* * * * * * *

Appendix A
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1959.

No. 15,414

UNITED AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

No. 15,415

SEPTEMBER TERM, 1959.

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

On Petitions for Review of Orders of the Civil Aeronautics Board.

Before: Wilbur K. Miller, Danaher and Bastian, Circuit Judges.

ORDER

These cases came on for hearing on the record from the Civil Aeronautics Board, and were argued by counsel.

On consideration whereof, and for the reasons indicated in our opinion this day filed herein, it is ORDERED by this court:

Appendix A
Page 2 of 2

(1) that these cases are hereby remanded to the Civil Aeronautics Board for the limited purpose of holding a hearing to determine, with all convenient speed, the relevant facts on the question of whether the Board's rules were so violated as to require a setting aside of the order on review;

(2) that all parties to these cases before the Board shall be admitted to participate as parties in the hearing, if they so request, and that any person or persons concerning whom evidence may be received in such hearing, shall, upon request, be permitted to cross-examine and to submit rebuttal testimony;

(3) that the Board is instructed to notify the Attorney General of the United States of the scheduling and pendency of the hearing and the purpose thereof; and to permit him, or his designated representative, if he so moves, to participate in the hearing as amicus curiae;

(4) that on the conclusion of the hearing the Board shall make its findings and report to this court and shall submit therewith to this court a certified transcript of the hearing;

(5) that the status quo in these cases shall be maintained pending further order of this court, and this court hereby retains jurisdiction of these cases pending receipt of the findings and final report of the Board pursuant to this order and pending the further order of this court;

(6) that within 60 days from the date of this order the Board shall report to this court its progress in respect of the hearing hereby ordered, with such recommendations to this court as to the Board may seem desirable at that stage of the proceedings; and

(7) that the Clerk forthwith certify to the Board a copy of the opinion this day filed and of this order.

Per Curiam.

Dated: May 19, 1960

BRIEF OF PETITIONER TRANS WORLD AIRLINES, INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

United States Court of Appeals
for the District of Columbia Circuit
FILED [illegible] 1960
CLERK

Nos. 15,414, 15,415.

UNITED AIR LINES, INC.,
TRANS WORLD AIRLINES, INC.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD.

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Statement of Questions Presented.

1. Whether petitioner was denied fair hearing in a proceeding where *ex parte* submissions, bearing upon adversary issues, largely authored, inspired or solicited by adverse parties, were directed to and acknowledged by respondent.

2. Whether, in receiving and acknowledging *ex parte* matter, respondent violated or acquiesced in the violations of its own Principles of Practice and Rules of Practice.

3. Whether petitioner was denied due process by (a) the suppression of a relevant report prepared by a group within respondent's organization, which later participated in the proceeding as a party and adopted a position adverse to petitioner; (b) the adoption by respondent of an Initial Decision that largely ignored the matters of fact and law urged by petitioner; and (c) the participation in a decisive capacity in the decision of a member of respondent who had not heard oral argument.

4. Whether findings in the final order which dispensed with the need for probative evidence on the economic impact of jet operations upon the structure of air transportation are fatally inconsistent with the findings on this subject upon which respondent premised its decision to hear the proceeding out of its normal order.

5. Whether, in authorizing a service which existing carriers were ready, willing and able to perform, without consideration of the effect thereof on the authorized carrier's other service obligations, respondent failed to apply valid statutory criteria.

6. Whether, in treating petitioner's allegations of *ex parte* activity as posing an enforcement issue, rather than a issue of denial of fair hearing, respondent failed to apply prevailing law.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Nos. 15,414, 15,415.

UNITED AIR LINES, INC.,
TRANS WORLD AIRLINES, INC.,
Petitioners,
v.
CIVIL AERONAUTICS BOARD,
Respondent,
AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD.

BRIEF OF PETITIONER TRANS WORLD AIRLINES, INC.

Jurisdictional Statement.

Petitioner, Trans World Airlines, Inc. (hereinafter TWA), seeks review of certain orders of the Respondent, Civil Aeronautics Board ("the Board"), purporting to grant to Intervenor, American Airlines ("American"), San Francisco-New York nonstop route authority in violation of TWA's rights and contrary to the public convenience and necessity. TWA is an air carrier holding certificates of public convenience and necessity authorizing service, *inter alia,* nonstop between San Francisco and New York and was an intervenor in the proceedings before the Board.

The jurisdiction of this Court is invoked under Section 1006 of the Civil Aeronautics Act, 52 Stat. 973, 1024,* and Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. §1009.

Statutes and Regulations Involved.

The statutes involved are the Civil Aeronautics Act of 1938, 52 Stat. 973 *et seq.*; and the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §§1001, *et seq.* Also involved are rules and regulations issued pursuant to such statutes by the Board. Pertinent provisions of the statutes and the rules and regulations are set forth in Appendix I, *infra.*

Statement of the Case.

The facts upon which TWA relies can most conveniently be set forth under three headings, (1) the formal procedural history of the case, (2) the history of *ex parte* communications in connection with the case, and (3) the developments following the Board's Order No. E-14412 (the original final order in the proceeding).

A. The Procedural History.

Late in 1955, the Board denied American authority to duplicate the nonstop authorizations of TWA and United Air Lines, Inc. ("United") between San Francisco and New York, on the ground that to permit such duplication would do violence to the competitive balance essential to a sound air transportation system. *Denver Service Case,* Docket No. 1841, *et al.,* Order No. E-9735, adopted November 14, 1955. This decision was reaffirmed upon reconsideration sought both by American and the City and County of San Francisco. Order Nos. E-9887, adopted December 30, 1955, and E-9975, adopted February 3, 1956.

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* By its terms the Federal Aviation Act of 1958, 72 Stat. 731, 49 U. S. C. §§1301 *et seq.,* is inapplicable to proceedings begun before its effective date. In all relevant aspects, however, the statutes are identical.

On May 3, 1957, American filed a motion to sever from Docket No. 5903, a broad-scale American application, the single issue of San Francisco-New York nonstop service and to assign that issue for immediate hearing (Tr. 6). The motion was supported in an answer filed May 7, 1957 by the City and County of San Francisco (Tr. 23). TWA and United filed answers in opposition (Tr. 71, 44).

On June 26, 1957, the Board unanimously adopted an order denying the motion but ordering a staff study of the issues raised thereby, to be submitted on or about December 1, 1957 (Tr. 129). Such a study was submitted to the Board by the Bureau of Air Operations, a division of the Board's staff (Tr. 2020), but in spite of repeated demands for its production both the Board and the Examiner have refused to make it available (Tr. 641, 670-671, 2023-2024).

On January 13, 1958, the Board by a 3-2 vote adopted an order reversing its previous determination and ordering an expedited hearing on American's San Francisco-New York nonstop application (Tr. 136). The stated basis of the order was "information now available to it" [the Board] (Tr. 136). TWA and United petitioned for reconsideration (Tr. 602, 581). They urged *inter alia* that "information now available" did not constitute a valid finding and that the staff report, which the Board had previously indicated it would consider in reaching its decision, should be made part of the record.

The Board denied these petitions by a 3-2 vote on April 9, 1958 (Tr. 639). In affirming its prior ruling that expedited hearing was required, it cited certain factually inaccurate data with respect to San Francisco-New York traffic and schedules (Tr. 640), emphasized the need for a proceeding devoted to the prospective economic impact of jet operations (Tr. 641) and stated that claims that the staff report should be made available to the parties had "no basis" (Tr. 641).

The case proceeded to prehearing conference, at which TWA again demanded and was refused access to the staff report (Tr. 670-671). Exception was taken to this ruling

(Tr. 692). At this point the motion of Northwest to consolidate a New York-San Francisco application by that carrier was granted (Tr. 710). Hearings were held in San Francisco and in Washington in the period July 30-September 18, 1958. Again, at the hearings, TWA sought through compulsory process to secure access to the staff report and to learn the identity of its authors (Tr. 2020-2024). Although the Bureau of Air Operations participated as a party in the proceeding, presented a witness at the hearing (Tr. 2014), introduced extensive exhibits (Tr. 2014) and thereafter took a position adverse to TWA's (Tr. 4040), the Examiner refused to compel production of the report, and questions directed to determining whether the Bureau's witness participated in the preparation of the report were ruled objectionable (Tr. 2021).

After the close of the record, briefs were filed with the Examiner. On March 9, 1959, the Examiner rendered an Initial Decision recommending the grant of American's application (Tr. 4084). In so doing he adopted in large part the rationale of the position of the Bureau of Air Operations (*e.g.,* Tr. 4125, 4149-4150). TWA's exceptions to the Initial Decision pointed out, *inter alia,* that the Examiner had undertaken to summarize TWA's multi-faceted position in the proceeding in four brief sentences, and that the Examiner had failed to rule on numerous important matters of fact and law asserted by TWA (Tr. 4223-4225).

Briefs were submitted (*e.g.,* Tr. 4255-4285), and the Board heard oral argument on April 29, 1959 (Tr. 4504). Member Hector was not present at oral argument (*Ibid.*). On May 15, 1959, the Board announced that it had voted tentatively to grant American's application by a vote of 3-2, with Member Hector voting with the majority (Tr. 4729). On September 2, 1959 an order to that effect was adopted (Tr. 4730). The majority adopted the findings, conclusions and recommendations of the Examiner (except as changed in minor aspects) (Tr. 4732), and made no reference to the assignments of legal error urged by TWA. It found that approximately $6,000,000 per year in passenger revenues would be diverted from TWA to American (and an equal amount from United to American) (Tr. 4748), and recognized that a cutback in TWA's and United's services would be required to accommodate American's proposed schedules (Tr. 4741-4743). It also stated that, although experienced cost and other data with respect to jet aircraft were not included in the record, no such data were necessary to a decision authorizing a third nonstop carrier (Tr. 4750-4752).

B. The Ex Parte Submissions.

The *ex parte* submissions before the Board divide into two parts: (1) an *ex parte* argument granted San Francisco on December 2, 1957 (Tr. 5466)* and (2) a history of *ex parte* communications between various persons and the Board extending over the entire history of the proceedings (Tr. 42, 42A, 98A, 115-118 (including 116A), 126-128, 131, 165-582, 4488-4491).**

1. The *Ex parte* Argument.

On or about November 4, 1957, Mr. C. R. Smith, president of American, visited San Francisco. He stated to civic officials of that city that American was prepared to inaugurate transcontinental jet service at an early date and tied the possibility of San Francisco's receiving this type of service to early and favorable Board action on American's San Francisco-New York nonstop application. He stated that a decision on whether an immediate hearing should be held was due December 1, 1957 (an obvious reference to the staff report) and urged the civic officials to press their efforts for such a hearing because "you have to keep hammering . . . if you want to get anywhere." (Tr. 601).

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* The Board has denied (Tr. 5455) that this argument was part of the proceeding and has not certified it as part of the record. It is before this Court as an attachment to TWA's Petition for a Stay and will be printed in the Appendix immediately following Order No. E-14664, ending at Tr. 5465. For convenience it will be referred to herein as beginning at Tr. 5466 and ending at 5482. This treatment has been agreed to by counsel for the respondent.

** The staff report previously mentioned also was, in effect, an *ex parte* submission, since TWA was never allowed access thereto. The essential facts relating to that report have, however, been set forth above.

Shortly thereafter, San Francisco sent a delegation to Washington, which, armed with the recommendations of California legislators in both Houses of Congress, requested and received permission to make an oral presentation to the Board without notice to TWA or United. This presentation, made on December 2, 1957, is replete with argument in support of early and favorable action upon American's application (Tr. 5466-5482).

In its previously mentioned petition for reconsideration of Order No. E-12103, TWA urged that the *ex parte* argument amounted to substantial legal error *in limine** and suggested that the order be reconsidered and the matter set down for further oral argument to hear the views of *all* parties (Tr. 611-612). The Board, in denying the petition, stated that such action would serve no useful purpose (Tr. 641).

2. *Ex Parte* Communications.

Impelled by a statement in the transcript of oral argument of April 29, 1959,** TWA undertook an investigation to determine the nature and extent of *ex parte* activity surrounding the proceeding. While this investigation was in progress the Board announced, on May 15, 1959, that it had voted tenatively to grant American's application (Tr. 4729).

As a result of TWA's investigation, it was determined that a vast number of *ex parte* communications had been exchanged between various persons and the Board at every decisive stage of the proceeding and not made a matter of record (interspersed with other matter at Tr. 165-576). In certain non-record files maintained by the Board in Docket Nos. 5903 and 9214 were found some 125 communications, virtually all taking a position adverse to TWA's on the merits, together with acknowledgments by the Board of most of them. The authors of the inbound communications included the Mayor of San Francisco (*e. g.* Tr. 358), Members of Congress from California (*e. g.* Tr. 545), New York (*e. g.* Tr. 512), New Jersey (*e. g.* Tr. 506) and Rhode Island (Tr. 533, 535), two Governors (Tr. 379, 270) and a Lieutenant Governor (Tr. 363) of California, two White House assistants (*e. g.*, Tr. 562-564), officers of a major political party (Tr. 470, 471), a number of travel agents and others. The Board's files further indicated that other matter submitted *ex parte* had been returned (*e. g.*, Tr. 211), and that in instances where individual members of the Board had received identical copies of the same communication (*e. g.*, Tr. 503), only one, or in some instances two, copies were on file.

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* TWA renewed this objection at every stage of the proceeding and urged that the recommendations of legislative officials, which prompted the Board to hear San Francisco, were improper (see *e. g.* Tr. 3977-3980).

** At the oral argument (Tr. 4524), Congressman Younger stated that since May, 1957 he had aided San Francisco's efforts to obtain a third nonstop carrier to New York. Congressman Younger had not appeared at the hearing, nor had TWA received a copy of any matter tendered by him for the record.

Additional *ex parte* communications adverse to TWA were placed in the record without notice to it (Tr. 42, 42A, 98A-B, 115-118 (including 116A) 126-128, 131, 4488-4491).

From the text and pattern of the available communications, it appears that many, if not all, were authored, inspired or solicited by parties to the proceeding (*e. g.*, Tr. 565). As to certain communications authored by travel agents, this fact was verified by further investigation by TWA (Tr. 4801) and United (Tr. 5145-5151).

C. Developments following the Board's Decision.

Within the time permitted by the Board's rules, TWA filed a petition for reconsideration and a stay of the Board's Order No. E-14412 (Tr. 4793, *et seq.*). It reproduced all of the *ex parte* matter bearing on the merits that had been found in the correspondence files (except for certain communications from private citizens) and urged that it was incompetent and prejudicial to TWA and further that it, together with the facts uncovered by TWA's additional investigation, disclosed repeated violations of the Board's Principles of Practice (14 C. F. R. 300) and Rules of Practice (14 C. F. R. 302).

Also, TWA reiterated its contentions with respect to the *ex parte* argument afforded San Francisco, the suppression of the staff report and the fatal deficiencies in the Examiner's Initial Decision that the majority of the Board had adopted. It urged that Member Hector's participation in the decision, although absent from oral argument, constituted error. It took the position that the Board's opinion lacked findings supported by substantial evidence in that (1) in a case expedited to secure evidence of the economic impact of impending jet operations, the Board had decided the issues without such evidence and had refused reopening to secure it; (2) in a case where the unchallenged testimony of expert witnesses had established the foreseeable frequency of San Francisco-New York nonstop service if American were authorized, the Board had based its decision upon a contrary hypothetical frequency put forward in brief and argument by American; and (3) in a case where the Examiner's Initial Decision had ignored many of the matters of fact and law urged by TWA, the Board had adopted that decision as its own.

Further, TWA urged that the Board had failed to apply valid statutory criteria in that it disregarded the fact that the same level of service would be provided whether or not American was certificated and had failed to address itself to the overall public interest, since the aircraft American proposed to divert to the San Francisco-New York market were, by that carrier's own admissions, needed elsewhere.

United petitioned for reconsideration on substantially similar grounds (Tr. 5117 *et seq.*). American and San Francisco submitted answers in opposition (Tr. 5177, 5158). Neither denied a part in authoring, inspiring or soliciting the *ex parte* communications. They urged (1) that similar activity had marked other Board proceedings; (2) that the non-record "correspondence files" were public; (3) that as to communications submitted prior to the order setting the matter down for hearing no rule prohibited *ex parte* communications, and (4) that TWA's and United's petitions were untimely. Beyond this, they urged that the evidence supported the Board's decision.

Faced with the fact that the Board's award was to become effective on November 1, 1959, and that the Board had not acted on the petitions for reconsideration, TWA and United petitioned this Court for review and for a stay of the Board's order on October 22, 1959. The petitions for a stay were set down for argument on October 29, 1959. On October 27, 1959, the Board, evenly divided, issued an order purporting to deny the petitions for reconsideration except to the extent of scheduling oral argument on November 17, 1959 on the allegations of *ex parte* submissions (Tr. 5332). As an incident of this determination, it withdrew the permanent certificate issued to American and reissued a certificate subject to withdrawal if deemed necessary after the scheduled argument. The Board, American and San Francisco thereupon opposed the issuance of a stay by the Court, urging *inter alia* that the issue of the effect of the *ex parte* submissions had not yet been resolved by the Board. The Court denied a stay for a period of twenty days and ordered that the procedures outlined in the Board's order be completed and a report made to the Court.

Argument was held before the Board on November 12, 1959 and an order issued on November 19, 1959 (Tr. 5345, *et seq.*). Therein the Board, by a 2 to 1 vote, stated that violations of its Principles of Practice had been shown, that rule-making procedures would be undertaken to assure against a repetition thereof, but that the Board's decision should nonetheless be reaffirmed, because (1) deprivation of the service would be an unduly harsh sanction for the violations found, and (2) TWA and United were actually or constructively on notice of the *ex parte* activity and hence had hoarded their grievances until after decision.

Statement of Points.

The Board erred:

(1) In receiving and responding to an exhaustive series of *ex parte* submissions, many, if not all, authored, inspired or solicited by parties to the proceeding, which dealt specifically with adversary issues in this adjudicatory proceeding and set forth the views of various well-known political persons and others with respect thereto;

(2) In failing to abide by its own Principles of Practice and Rules of Practice with respect to the submissions mentioned under (1) *supra;*

(3) In suppressing, in spite of repeated requests for its production, a report made by a division of its staff which thereafter participated in the proceeding as a party and took a position on the issues adverse to TWA's.

(4) In adopting an Initial Decision which failed to set forth the matters of fact and law urged by TWA;

(5) In permitting ex-Member Hector to act in a decisive capacity in its decision, although absent from oral argument;

(6) In failing to set forth findings supported by substantial evidence logically related to its ultimate finding of public convenience and necessity;

(7) In failing to apply valid criteria of public convenience and necessity; and

(8) In refusing to set aside its original final order following further proceedings.

Summary of Argument.

The Board's function in the proceeding was wholly adjudicatory. In this process its legitimate interest extended only to the facts of record, as submitted, interpreted and argued by the adversary parties. The views of strangers to the proceeding had no proper place, and the submission of these views to the Board, without notice to TWA (or United) and without opportunity to respond thereto, denied the latter due process of law. This error was compounded by the fact that the successful parties below were in large part, if not wholly, responsible for the exposure of the Board to the offensive communications and further by the fact that the authors were in virtually all instances well-known political figures or persons familiar with air transportation matters, whose views must be presumed to have had argumentative weight.

In receiving and responding to the *ex parte* matter the Board violated or acquiesced in the violations of its own Principles of Practice and Rules of Practice repeatedly, in that the submission of the matter could not be countenanced under either the Principles or Rules. The objectionable nature of this *ex parte* material was not cured by the fact that the Board in some instances placed it in files where it might be discovered upon investigation, since no published rule of the Board would alert a party to the possibility of such *ex parte* communications on the merits in an adversary proceeding. The Board's findings of multiple violations of its principles and rules and the need for extensive rule making proceedings to prevent a repetition of the history of this case establish conclusively the lack of fairness and appearance of fairness required of administrative proceedings and dictate that the Board's order be set aside.

The withholding from the parties of a report dealing directly with the issues, prepared by the Board's staff, which thereafter participated in the proceeding as a party, obviously was prejudicial. So also was the reliance by the Board upon an Initial Decision which failed to give objective treatment to the issues. When the members of the Board who heard oral argument divided equally on the issues, the vote of ex-Member Hector in favor of authorizing American should not have been recorded, since he did not receive the benefit of oral exposition of the facts and arguments in this closely contested case.

The Board's findings in Order No. E-14412 are arbitrary, in that (1) having theretofore justified its expedition of the proceeding upon the need to secure evidence on the economics of jet operations, it resolved the issues without probative evidence on that subject and denied motions to reopen the proceeding to secure such evidence; (2) its economic justification of its decision is based upon a hypothetical frequency of service at odds with all the expert testimony of record; and (3) the Board relies for economic justification of its decision upon powers to control frequencies of the authorized carriers, whereas such powers are expressly denied to the Board by the Civil Aeronautics Act.

The Board has failed to apply valid statutory criteria in reaching its decision. Its opinion indicates that the quantum of service available to the public will not be increased by virtue of the authorization of American, and the adverse effects of its decision upon other markets served by American has at no point been weighed either by the Board or the Examiner.

In the proceedings following final decision, the Board failed to draw impelling inferences of fact and to apply prevailing law. It resolved all possible inferences against TWA and United and, in those instances where it could not do so, it treated the allegations of *ex parte* activity as posing an enforcement issue, rather than a case of denial of fair hearing. In ruling that any such denial could be condoned, the Board disregarded well established principles of law to the contrary.

ARGUMENT.

I.

Ex parte activity vitiates the Board's proceedings.

The unique nature of the record in this case is perhaps best indicated by the fact that at every decisive phase of the proceeding below the Board was subjected to two independent lines of argument. One consisted of the typical formal filings, appearances by counsel, *etc.* of the parties, in conformity with rules and regulations of the Board, duly promulgated; the other, the views of one of the parties and a large number of strangers to the proceeding, submitted *ex parte.* That the latter came to the Board's attention was in no wise inadvertent. Quite aside from the fact that their sheer volume and timing could be explained only if these views were submitted pursuant to a formalized plan, the record shows that one of the parties, at the very outset of the proceeding, wilfully embarked upon a program designed to elicit political support for its position before the Board. Thus, in a press release of May 9, 1957 (six days after American's motion and two days after San Francisco had answered in support thereof) the San Francisco Public Utilities Commission stated (Tr. 472):

> "San Francisco, through its Public Utilities Commission, has thrown its full support behind a move to obtain a much-needed third non-stop air carrier service between San Francisco and New York City, which would greatly benefit all the residents and communities of Northern California.
>
> "At the same time, San Francisco officials called upon all Northern California communities, Chambers of Commerce and other organizations to get behind this move to provide at least three non-stop carrier services to New York. The support of all California Federal and State legislators also was being sought."*

Except for the appearance of the San Francisco and Oakland Chambers of Commerce as intervenors throughout the proceedings, and the participation in oral argument of a number of Congressional representatives, no such support was forthcoming within the Board's rules (14 C. F. R. 302). Under those rules, participation by non-applicants is possible only in the following fashions:

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* To the same effect is the formal resolution of the Pacific Utilities Commission of May 7, 1957 (Tr. 398).

(a) By formal intervention under Rule 15 (14 C. F. R. 302.15) dependent upon a showing of a substantial interest in the proceeding not represented by existing parties;

(b) By appearance at the hearing under Rule 14 (14 C. F. R. 302.14) or, in the case of a representative of any department, agency or branch of the Federal Government or any state government (including a state aviation commission), by appearance at oral argument.

There was, however, no dearth of such support otherwise than in accordance with these rules. Before the proceeding had been completed, the Board could conclude from the *ex parte* submissions that a favorable decision upon American's application would be in accord with the desires of some 50 influential persons, including Senators, Congressmen, Governors, White House Assistants, Chamber of Commerce officials, high ranking officers of a major political party and others. Moreover, the *ex parte* submissions went much farther than mere expressions of support. They advanced detailed factual considerations (*e.g.*, Tr. 480) legal argument (*e.g.*, Tr. 327) and economic theses (*e.g.*, Tr. 510). Several, consisting of letters from travel agents, *solicited by American*, can only be viewed as an effort to bring to the Board's attention expert testimony on the need for additional service (*e.g.*, Tr. 361).*

One *ex parte* matter of special import is the oral argument in support of American's motion for expedited hearing submitted by the City of San Francisco on December 2, 1957. A reconstruction of the background of that argument is revealing. Originally the Board had found no factual justification for the grant of American's motion, but, in lieu of denying it flatly, had ordered a study by its staff (Tr. 129).* Shortly before the staff study was due to be submitted to the Board, the president of American exhorted the City of San Francisco to "keep hammering" so that it might secure jet service at the earliest possible date (Tr. 601). There followed a number of *ex parte* communications from California members of Congress and others (Tr. 552-576) and, ultimately, at the request of San Francisco, and on the recommendations of "representatives of the State of California in both the Congress and the Senate" (Tr. 5466), the Board agreed to a conference with representatives of that city.

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* The Court may notice as a matter of common knowledge the fact that travel agents are typically representatives of a large number of carriers, in daily contact with the traveling public, and hence may be considered both objective and well-qualified witnesses on the need for services.

The conference resulted in an unvarnished plea for the grant of American's motion and application. Not until the last half-page of a 17-page transcript is there any reference to San Francisco air service needs other than that purportedly involved in American's application.** And shortly thereafter the Board reversed its previous determination and, on the basis of alleged traffic and operational considerations previously found unpersuasive, ordered expedited hearing on American's application (Tr. 136).

It is impossible to harmonize this whole history of *ex parte* activity with traditional concepts of due process in either judicial or quasi-judicial proceedings. Throughout judicial history, it has been deemed essential to insulate the judiciary from the *ex parte* approach in order to preserve fairness and, of equal import, the appearances of fairness. See, *e. g.*, Canon 17 of the Canons of Judicial

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* Whether this unusual course, which had the effect of relieving American of the burden of proof, was influenced by the pressure in support of the motion, as evidenced by the *ex parte* submissions, the parties cannot know. TWA and United had pointed out, however, in answer to the motion that all the matters raised therein had previously been urged unsuccessfully in the *Denver Service Case*, Docket No. 1841, *et al* only briefly theretofore (Tr. 90-91, 47-49).

** This is the complete answer to the Board's ruling in Order No. E-14664 that TWA's premise that the conference related to the proceeding below is "faulty". In addition, however, no less than six Board acknowledgments of *ex parte* communications at the time (Tr. 565, 567, 569, 571, 573, 575) recognized that relationship.

Ethics of the American Bar Association; *In Re Murchison,* 349 U. S. 133, 136; *Offutt* v. *United States,* 348 U. S. 11; *Root Refining Co.* v. *Universal Oil Products Co.,* 169 F. 2d 514. And even the accidental exposure of the judiciary to incompetent matter has historically been deemed prejudicial when it could possibly have influenced the result, even where the trier of the facts has disclaimed any effect upon his decision. *Peck* v. *Pierce,* 28 Atl. 524 (Conn. 1893); *McLaughlin* v. *Los Angeles Ry.,* 182 Pac. 44 (Calif. 1919); *Rapson* v. *Leighton,* 73 N. E. 540 (Mass. 1905); cf. *Tri State Broadcasting Co.* v. *Federal Communications Commission,* 68 App. D. C. 292, 96 F. 2d 564.

In the administrative process, much the same rule applies. Section 7 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. §1007, provides that every party shall have the right to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Further it is provided in that section that the formal record shall be exclusive for decision. In *Interstate Commerce Commission* v. *Louisville & Nashville Railway,* 227 U. S. 85, 93, the Supreme Court posited the requirements of fair hearing as including (1) the right of all parties to be fully apprised of the evidence presented, (2) the opportunity to cross-examine witnesses and inspect documents, and (3) the opportunity to offer evidence in explanation or rebuttal. Where these requirements are not met, the resultant order is void. *Ibid* at p. 91.

Similarly, in *Morgan* v. *United States,* 304 U. S. 1, the Supreme Court described the right to a hearing as embracing the right to know the contentions of the opposing parties and to meet them. And more recently, that Court has assumed jurisdiction of and summarily reversed and remanded cases wherein the mere suggestion of *ex parte* activity was contained. *Sangamon Valley Television Corp.*

v. *United States,* 358 U. S. 49; *WORZ, Inc.* v. *Federal Communications Commission,* 358 U. S. 55.*

In recognition of the same principle of the fatal conflict between the right to a full and fair hearing and the existence of extra-record contacts with the trier of the facts, this Court has reversed several recent F. C. C. determinations. *WKAT, Inc.* v. *Federal Communications Commission,* 103 App. D. C. 324, 258 F. 2d 418; *Massachusetts Bay Telecasters, Inc.* v. *Federal Communications Commission,* 104 App. D. C. 226, 261 F. 2d 55; *Sangamon Valley Television Corp.* v. *United States,* .... App. D. C. ...., 269 F. 2d 221 (a rule-making proceeding, and hence legislative in character, in which function the right of lobbying has been historically recognized.)

It is, of course, recognized that in our complex society and, particularly, in fields of administrative law where the agencies serve in adjudicatory, rulemaking and executive capacities, it is impossible to insulate completely the trier of the facts from information that may relate peripherally to a pending adjudicatory proceeding.** That is the holding of this Court in *Van Curler Broadcasting Corp.* v. *United States,* 98 App. D. C. 432, 236 F. 2d 727, cert. den.

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* In those cases, certain testimony before a Congressional committee (where, of course, interested parties to the F. C. C. proceeding could not be fully represented) as to *ex parte* activity was mentioned for the first time in the Solicitor General's brief in opposition to a writ of certiorari in the Supreme Court. Despite the Solicitor General's position that a writ was unnecessary in view of the broad powers of the Court of Appeals with respect to its own judgments, and despite the general rule that matter raised for the first time in appellate proceedings will be disregarded (*e. g. United States* v. *L. A. Tucker Lines,* 344 U. S. 33), the Supreme Court assumed jurisdiction. This can only be interpreted as evidence of the Court's thorough condemnation of the *ex parte* approach in any fashion.

** For example, a sharp general decline in air traffic, revealed by recurrent reports to the Board, might color the judgment of individual members adversely to applicants for vastly expanded service, and, contrariwise, an upsurge in traffic might redound favorably to such applicants.

352 U. S. 935, and of the Court of Appeals for the Second Circuit in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* .... F. 2d. ...., (Docket No. 25,422, decided October 7, 1959). No such situation is presented here. All of the *ex parte* matter referred directly, indeed exclusively, to the issues posed in the proceeding. Moreover, in the history of the proceeding the Board made only two token efforts to stem the flow of *ex parte* submissions.* At all other points, it did more than remain passive; it *encouraged* the practice by acknowledging all Congressional mail with appreciation for the sender's "interest" and a promise to keep him informed of future developments (*e. g.,* Tr. 296).

The Board's efforts to justify its departure from these basic elements of due process in adjudicatory proceedings take several forms, all unpersuasive. First it is contended (Tr. 5441) that the provision of Section 401 (g) of the Civil Aeronautics Act, 52 Stat. 987, to the effect that any interested person may file with the Board a memorandum in support of the amendment of a certificate, lends justification for the course here followed. It is elemental, however, that when such broad statutory provisions are implemented by specific agency regulations, the regulations are controlling. The Board has passed such specific regulations governing public participation in its proceedings in Rules 14 and 15 of its Rules of Practice (see *supra,* p. 14); and these rules were in no respect observed.

Secondly, it is contended (Tr. 5447) that while certain of the communications purportedly submitted under Rule 14 (14 C. F. R. 302.14) did not qualify under that rule they "cannot seriously be said to go substantially beyond the bounds of permitted practice."* This statement is unintelligible. Rule 14 assures that adverse parties will receive notice of the contentions being made to the Board, whether in writing (at the time of the exchange of briefs) or orally (at oral argument). No such protection is afforded when the provisions of the rule with respect to personal appearance, service and timeliness are ignored.**

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* In July, 1957, the Chairman admonished the Mayor of San Francisco to resubmit as a petition for reconsideration, with copies to all parties, a letter complaining of the denial of American's motion (Tr. 536). At the oral argument of December 2, 1957, the Chairman unsuccessfully sought to steer the argument away from the alleged merits of American's motion (Tr. 5467).

Thirdly, the Board, proclaiming itself unable to insulate itself from the public in its adjudicatory proceedings (Tr. 5454), treats its non-record correspondence files as a time-honored institution, as to which actual or constructive notice must be imputed to the parties (Tr. 5439). Of course, no such proposition can be established *in this record,* but in this connection the Court may note the following:

(a) With respect to the allegedly well-established custom of receiving this *ex parte* matter and depositing it in correspondence files, it will be noted that the treatment thereof in this very case varied widely. In some instances *ex parte* matter was placed in the record without notice to the parties (*e. g.,* Tr. 115); in others, it was placed in the correspondence files (*e. g.,* Tr. 165); in others it was returned to the sender at his request (*e. g.,* Tr. 240) and in still others, it was returned to the sender with directions to refile as a formal document (Tr. 536).

(b) Again, with respect to the alleged custom, the legislative history of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.* is replete with Congressional sentiment that administrative practices needed to be formalized in rules and regulations, duly published, to obviate just such claims as the Board now advances. See *e. g.*, Appendix B to Attorney General's Manual on the Administrative Procedure Act (1947) (at p. 123), briefly recounting the ten-year history of efforts to codify horizontally administrative practice for the protection of the public. This sentiment was eventually embodied in Section 3 of the Act (60 Stat. 238, 5 U. S. C. 1003), including provision for the publication of "all formal or informal procedure available," and providing that "[n]o person shall in any manner be required to resort to organization or procedure not so published."* *No rule permits ex parte representations on the merits.* In fact, as more fully shown hereinafter, such representations affirmatively violate the Board's Principles of Practice. Moreover, the Board's violation of this mandate is plain on the face of its Order No. E-14664; it finds a need (Tr. 5456) for reviewing its informal procedures, outlined in no published rule, in which it hears cities with respect to their air transportation needs in the absence of directly affected carriers.

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* Strangely, in assaying the evidence as to whether the *ex parte* communications were inspired, the Board attaches no significance to the fact that a large number of strangers to Board practice all submitted such communications under the identical misapprehension that Rule 14 permitted them.

** In typically broad-brush fashion, the Board states (Tr. 5447) that, since 5 written communications purportedly under Rule 14 were noted by the Chairman at oral argument, the parties must be charged with notice of all (of which there were 18). Presumably even the chairman did not then know of the other 13, and oral argument is the last formal step in the Board's proceedings before final order.

(c) While the Board states (Tr. 5439) that its practice of filing *ex parte* submissions serves "the salutory purpose of apprising parties of the representations contained therein", diligent research has uncovered only a single instance in the entire twenty-year history of the Board wherein reference was made in a Board decision to correspondence on the merits of a proceeding, and, in that instance, the Board ruled in strong language that such correspondence was in direct violation of the Board's Principles of Practice and could not be condoned. *Air Transport Associates, Inc., Enforcement Proceeding,* 14 CAB 805, 813 (1951).**

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* In an obviously sound interpretation, the Court of Appeals for the Second Circuit has recently ruled that the phrase "be required to resort to" means also "be subjected to." *Columbia Research Corp.* v. *Shaffer,* 256 F. 2d 678.

** The fatal effect upon orderly procedure of timely rebuttal by the parties to such representations, followed by inevitable surrebuttal, *etc., etc.,* all outside the record, seems to have escaped the Board's attention.

(d) With respect to actual notice of the *ex parte* material, the verified pleadings of TWA state that no such notice was had (Tr. 4797). (Under the Board's rules, the signature of an attorney constitutes verification).

(e) With respect to the Board's doctrine of constructive notice, this Court long ago ruled that no such doctrine would be invoked in aid of wrongdoing in the absence of culpable negligence. *Adriaans* v. *Dill,* 37 App. D. C. 59 (1912) (not reported elsewhere). As to the absence of negligence, it may be noted that not only counsel for TWA was ignorant of the contents of the correspondence files; so also were counsel for American (Tr. 5396) and Northwest (Tr. 5385).

(f) With respect to the Board's statement (Tr. 5439) that its treatment of the *ex parte* matter accords completely with Congressional views, quite the contrary is true. If the Harris bill (H. R. 4800, 86th Cong. 1st Sess., 1959), with its provision that all communications on the merits must be placed in a public file, were enacted, then, of course, all parties would be placed on notice that such a file was maintained. But the Carroll bill (S. 2374, 86th Cong. 1st Sess. 1959), supported by the American Bar Association, would require *actual* notice to all parties of such communications and would, indeed, make communications on the merits after the matter was set down for hearing criminal.

It is, of course, the untenable premises just discussed that form the bases for the Board's conclusion (Tr. 5457) that TWA and United hoarded their grievances with respect to *ex parte* correspondence until after final decision. The actual situation, as disclosed by the verified pleadings, was that the material came to the attention of TWA only after the Board has announced its tentative decision. Clearly, the parties could not anticipate when an order implementing that decision would be forthcoming; and the Board has in the past been caustically critical of pleas for reopening in the indefinite interval between its press release decision and final order. See *e. g.,* Order No. E-13023 in the *St. Louis Southwest Service Case,* Docket No. 7735, *et al.,* before this Court in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* Case No. 14,798, denied December 10, 1959.

In any event, the Supreme Court has ruled that objections made at any point before the agency of original jurisdiction are timely. *Bridges* v. *Wixon,* 326 U. S. 135, 152. And more basically, objections which go to the essential fairness of proceedings are affected with a public interest and hence are not deemed waived even if raised for the first time on appeal. *Root Refining Co.* v. *Universal Oil Products Co., supra; Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 238.

Moreover, the Board's conclusion (Tr. 5456-5457) in this connection that an earlier objection by TWA and United would have precluded the possibility of prejudice is unsupportable. Timely objection was made to the *ex parte* argument afforded San Francisco and to the *ex parte* Congressional recommendations that spawned it (Tr. 611), and these objections were renewed at every later stage of the proceeding (Tr. 3975, 4260). The Initial Decision (Tr. 4083-4151) ignored these contentions, whereupon appropriate exception was taken thereto (Tr. 4225). Again, however, the Board's final order (Tr. 4730) was wholly silent on these matters. The Board cannot validly urge, therefore, that contentions of the same legal error, upon different facts, would have removed the possibility of prejudice, if, indeed, any action by the Board could be deemed to remove such prejudice *ex post facto.*

Finally, on this subject, brief reference should be made to the Board's conclusions (Tr. 5438, 5457) that in any event, the Board was not affected by the *ex parte* material and proceeded upon substantial evidence which justified the result. Such assurances might be relevant if, as is the *Van Curler* and *Eastern* cases, *supra,* the receipt of the *ex parte* material could be otherwise justified, but that is not the present case. The appropriate test here is a purely objective one, *i.e.,* whether it can be said with reasonable certainty that the *ex parte* submission of evidence and argument by over 50 influential political figures and others could not possibly have prejudiced TWA and United. *Peck* v. *Pierce, supra.* It is submitted that the distinguished personalities involved, the Board's relationship to the Congress and the Executive Department, the motives of the persons who put in motion the *ex parte* submissions, the language of the Board's acknowledgments thereof and the identity of the result with that urged therein all effectively belie the possibility of any claim that this extensive body of incompetent material can be viewed as meaningless.

II.

The proceedings below are vitiated by repeated violations of the Board's Principles and Rules of Practice.

Preliminary to a discussion of the effect of the widespread violations of the Board's Principles and Rules of Practice shown in the record, it is important to note what these principles and rules are. The latter (14 C. F. R. 302) constitute a body of procedural regulations not unlike the typical rules of a court of original jurisdiction, governing such matters as filing, service, procedures, etc. The principles (14 C. F. R. 300) are rules in a much more basic sense. They govern the fundamental ethical relationship between the Board and the parties appearing before it and prescribe the proper scope of that relationship. In the light of the fact, therefore, that the Courts have held that results arrived at without observance of agency rules cannot stand, *Accardi* v. *Shaughnessy,* 347 U. S. 260; *Service* v. *Dulles,* 354 U. S. 363, 372-3; *Jefferson Amusement Co.* v. *Federal Communications Commission,* 96 App. D. C. 375, 226 F. 2d 277; *American Broadcasting Co.* v. *Federal Communications Commission,* 85 App. D. C. 373, 179 F. 2d 437, 442-3; *United States ex rel. Ohm* v. *Perkins,* 79 F. 2d 533, 534; *Sangamon Valley Television Corp.* v. *United States, supra* (on remand), nonobservance of the principles, to the detriment of innocent parties, *a fortiori* requires that agency determinations be set aside.

Exhaustive documentation of the violations of the Board's Principles in this proceeding appears unnecessary, since Order No. E-14664 is replete with concessions that substantial violations have in fact occurred in this case (Tr. *e. g.* 5445-5449, 5451-5453). While TWA, as shown *infra,* disagrees strongly with the Board's conclusions in that order to the effect that the violations of American appear minor, it suffices for present purposes to point out that it cannot be urged that the record does not disclose material violations of the principles set forth in Rule 2(a) (14 C. F. R. 300.2a), outlawing "private communications on the merits of the case to a member of the Board or its staff . . . by any person, either in private or public life, unless provided for by law," and Rule 2(c) (14 C. F. R. 300.2(c)), outlawing "efforts by any party interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board."*

The violations of the Rules of Practice are equally clear. As previously noted, numerous *ex parte* communications, purportedly submitted under Rule 14 (14 C. F. R. 302.14) were accepted, although in hopeless noncompliance with that rule; several of these were placed in the record without notice to TWA (Tr. 4488-4491). Rule 18 (14 C. F. R. 302.18), limiting the submissions in support of a motion to a single timely answer, was violated by accepting numerous submissions, from parties and non-parties alike, in support of American's motion after the cut-off date, including the oral argument submitted by San Francisco.** To the extent that the submissions received after the hearing contain allegations of fact (*e. g.,* Tr. 259) they violated Rule 24(j) (14 C. F. R. 302.24(j)) and to the extent they contain argument (*e. g.,* Tr. 300) they violated Rules 26 and 31 (14 C. F. R. 302.26 and .31). *In short, since none of these submissions was countenanced by any rule, all were in violation of the body of rules governing practice before the Board.*

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* The obviously inspired nature of the editorial comment forwarded to the Board by the Mayor of San Francisco (Tr. 402-417) also discloses violations of the latter rule against giving "statements to the press . . . designed to influence the Board's judgment in the case."

The Board's answers to these objections are unavailing. It states first (Tr. 5440-5441) with respect to the violations of the Principles of Practice that those principles are subject to ambiguity and uncertainty in several respects and must be revamped. If so, of course, they did not serve their cardinal purpose, for the Supreme Court in *Bridges* v. *Wixon, supra,* has appropriately characterized rules as "designed as safeguards against essentially unfair procedures" (326 U. S. at 153). Clearly the Board cannot successfully contend, on the one hand, that its principles were so ineffective as to warrant extensive corrective action, and, on the other, that the proceeding was not "essentially unfair" to parties which, completely innocent themselves, were victimized by this multi-faceted breakdown.

Actually, the Board's conclusion of multiple defects in its ethical principles is a make-weight introduced to condone violations that would otherwise be inexcusable. The principles have existed in unchanged form since 1951 and were promulgated merely to formalize the Board's historic view that it is in all respects bound, in its ajudicatory capacity, by ethical concepts prevailing in the Courts (14 C. F. R. 300.1). And extensive discussion of the unlikely possibility that a Court would indulge in a running series of correspondence with respect to the adversary issues in

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** The Board inexplicably rules (Tr. 5446) that, with respect to San Francisco's several submissions in support of the motion, the objections went not to their substance but only to the failure to serve TWA and United. TWA urged that the submissions were completely objectionable and hence did not make specific reference to their completely hearsay nature and lack of contribution to the factual record, but the latter objections should be obvious.

a proceeding before it, either with parties or strangers, would appear unnecessary.

With respect to the violations of the Board's rules, the Board's principal error lies in its statement (Tr. 5454) that these rules apply only to formal documents submitted for the record. Here, in one fell swoop, the Board makes meaningless its carefully constructed body of rules governing its adjudicatory proceedings, for it would countenance a dual system for the submission of argument, formal and informal, the latter uninhibited as to content, form or timeliness.* Exactly such a proposition was rejected by this Court in the *Sangamon Television Corp.* v. *United States, supra,* when it stated (269 F. 2d at 225):

> "By plain implication, this [cut-off] rule forbade submitting material to the Commissioner's members after the time for filing it with the Commission had gone by. The rule cannot be interpreted to permit parties to make off the record contentions that it forbids them to make on the record."

Certainly, it is difficult to visualize any holding more damaging to fairness and the appearances of fairness in administrative proceedings than approbation by this Court of the Board's conclusion that extra-record submissions shall be accepted outside the regulations and, upon objection thereto, shall be ruled both inevitable and harmless.**

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* Moreover, under the Board's reasoning, it would countenance such submissions by agents of the parties.

** Under this *rationale,* a party could arrange for the submission to the Board of its position in countless variations, secure in the knowledge that this course of conduct could do no harm and, in the light of the impact of the written word (and the personal signature) might do some good.

III.

Suppression of the staff report constitutes reversible error.

The report of the Bureau of Air Operations with respect to the public need for immediate hearing could not fail to set forth facts and conclusions with respect to the responsiveness of the existing San Francisco-New York nonstop services (TWA and United) to the public demand. Hence it was of obvious relevance to the issues posed in the proceeding below. By suppressing the report throughout the proceeding, while permitting those responsible for its preparation to participate as a party, the Examiner and the Board:

(a) foreclosed inquiry and argument as to whether the Board's action in ordering immediate hearing was arbitrary;

(b) foreclosed confrontation of the Bureau's witness as to the consistency of the methodology, conclusions, etc., between the report and the Bureau's case;

(c) foreclosed argument with respect to any differences in the conclusions of the report and the eventual recommendation of the Bureau in favor of the authorization of American;

(d) deprived the record of the factual findings of the report, and

(e) foreclosed TWA and United from explaining, testing or rebutting any conclusion of fact contained therein.

In view of the report's obvious relevance, the only conceivable color of authority for its suppression would be under some doctrine of privilege. But even if it is assumed that a non-executive body has any privilege whatever (an extremely dubious thesis), no privilege was urged at any point in the proceeding. The Board initially ruled (Tr.

641) that, since certain findings were made by the Board, claims for the production of the report had "no basis;"* in the prehearing conference report, the Examiner ruled (Tr. 670-671) that the Board had already resolved the issue of the report's production adversely; and at the hearing the Examiner ruled (Tr. 2024) that the report was immaterial.**

Even in the face of a claim of privilege by an *executive* agency, the District Court of the District of Columbia has ruled that an appearance in the proceeding by the group responsible for a report constitutes a waiver of any such claim. *In re Boeing Airplane Company,* Case No. Misc. 31-58, decided April 9, 1959, now on appeal in this Court *sub nom. Boeing Airplane Company* v. *Coggeshall,* Case No. 15,311, argued December 17, 1959.

It is submitted that the internal workings of an administrative agency are not so sacrosanct that parties grievously affected by its orders must be left to speculate upon the foundations of the adversary position espoused by an arm of that agency. The Bureau of Air Operations was ordered by the Board to survey the need for immediate hearing; it later was permitted to adopt an adversary position which found substantial acceptance with the Examiner; and the Examiner's recommendations were adopted in large part by the Board. In view of this history, access to the report assumed vital importance to the defensive interests of TWA, and its denial cannot be viewed otherwise than as prejudicial to these interests.

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* By a process of repeated disclaimers, the Board has eliminated all rational bases for its order expediting the proceeding. As noted, it disclaims reliance on the staff report and now disavows (Tr. 5454) the assurances in its acknowledgments of *ex parte* communications that the views expressed at the oral argument of December 2, 1957 would be taken into account. The findings in the order granting American's motion recited facts known prior to its previous order denying that motion. Hence the reasons for the reversal of the latter order now appear completely mysterious.

** At another point (Tr. 2022) the Examiner suggested that the report was confidential, which is not a valid claim of privilege for two reasons: (a) confidential matter can be reached by compulsory process, and (b) since no privilege extended to the Examiner, he could not claim any.

IV.

The adoption by the Board of the Examiner's initial decision is reversible error.

The function of the Initial Decision (and alternatives thereto) under Section 8 of the Administrative Procedure Act, 5 U. S. C. 1008, is plainly to crystallize the issues and to furnish the agency finally responsible for the decision with the views of all parties with respect thereto. That it failed to serve this function herein is shown by the fact that TWA's position, set forth in copious detail in the record, is attempted to be summarized formally by the Examiner in four sentences, one factually inaccurate (Tr. 4107).* Although TWA raised this matter by appropriate exception (Tr. 4223) and discussed the deficiencies in its brief to the Board (Tr. 4261-4263), the Board adopted the Initial Decision as its own (Tr. 4732). While some elaboration of the Board's *rationale* is contained in Order No. E-14412, it repeatedly falls back upon the Examiner's conclusions upon controversial issues (E.g. Tr. 4733, 4735). Aside from the general adoption thereof, the Board cites the Initial Decision's conclusions as its authority for rulings on particular issues no less than thirty times (Tr. 4732-4756).

It is submitted that the lack of objective analysis disclosed by the Initial Decision could be cured only by the Board acting *de novo* upon all the substantial issues raised in the record. It has failed to do so, or even to acknowledge by a ruling upon TWA's exceptions that the issue of such deficiencies in the Initial Decision was ever urged upon it.

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* TWA submitted 64 exhibits, 90 pages of testimony and 37 pages of brief to the Examiner. The Examiner's sole comment under the heading "TWA" was that it opposed additional service and that no support was submitted for TWA's estimate of diversion, a subject to which several exhibits and considerable testimony was devoted.

V.

The participation of ex-Member Hector in a decisive capacity in the decision, although absent from oral argument, is reversible error.

In the 3-2 division of the Board in Order No. E-14412, ex-Member Hector's vote was decisive. He had not, however, heard oral argument, and no notation was made at oral argument of his intention to participate in the decision. The case is, therefore, analogous to *WIBC, Inc.* v. *Federal Communications Commission,* 104 App. D. C. 126, 259 F. 2d 941. In that proceeding F. C. C. Commissioner Craven, who had not heard oral argument, cast the deciding vote, and the order was reversed on that ground.

It is true that the statute in the cited case requires the Commission to hear oral argument, whereas Section 1004 (a) of the Civil Aeronautics Act requires the Board to "hear or receive" argument. The record shows, however, that the Board in this proceeding determined to "hear" rather than "receive". (Tr. 4245, 4506).

The Board's own *ad hoc* ruling in this case, therefore, was that oral argument would be *heard.** This determination was consistent with the importance of the case and the close division of the Board disclosed by the dissents in its earlier phases. The rule, having been announced (not once, but twice), cannot be abrogated by the unilateral action of the agency (*Sangamon Television Corp.* v. *United States, supra,* and cases noted therein). The obvious prejudice to TWA from its attempted abrogation is attested by the high value placed upon the right of oral appearance by the Courts. *Londoner* v. *Denver,* 210 U. S. 373, 386.**

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* On previous occasions, as in *Sisto* v. *Civil Aeronautics Board,* 86 App. D. C. 31, 179 F. 2d 47, when an absent member intended to participate in decision, that fact was noted.

** The importance of oral argument in the Board's proceedings may even transcend that in an appellate court. The record is typically a vast one, and the only inevitable exposure of the Board to adversary advocacy is in oral argument. Briefly thereafter (in this case two weeks) the Board ordinarily announces its tentative decision (Tr. 4729).

In summary, it seems fatuous to suggest that it was an important legal right of the parties to be afforded the opportunity to argue orally the significance of the facts to four members of the Board, and, at the same time, to urge that the fifth member, absent for unexplained reasons, and whose vote was unnecessary for a quorum, could properly sit in judgment without benefit of the impressions which only such an argument can convey and, in practical effect, determine the outcome.

VI.

A fatal lack of valid findings is disclosed by the Board's decision.

Originally, as justification for its action in expediting the proceeding (Tr. 136), and thereafter in ruling against TWA's and United's objections thereto (Tr. 641) the Board stressed the need for a proceeding devoted to the general impact upon air transportation of the advent of high-speed large-capacity jet aircraft.

In the light of this emphasis, TWA and United stressed throughout the proceeding these facts:

(a) that the record disclosed a complete absence of experienced data with respect to jet aircraft (*e. g.*, Tr. 4275-4277);[*]

(b) that the only predictable effect of conversion to jet aircraft was a large-scale increase in capacity on long-haul routes (*e. g.*, Tr. 4278);

(c) that in view of the 3-round trip per day per carrier frequency in the San Francisco-New York nonstop market deemed essential by all the expert traffic witnesses, jet operations by more than two carriers would be economically catastrophic (*e. g.*, Tr. 4274).

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[*] The record was closed in September 1958, and the first domestic jet operations were undertaken in January, 1959.

As experienced data or jet operations became available, United moved (Tr. 4048) to reopen the record to permit introduction thereof, and TWA supported this motion (Tr. 4075).

The Board's treatment of this entire subject was incredibly arbitrary. In spite of the avowed importance of jet data, it ruled that the absence of actual operating experience of jet aircraft was not fatal (Tr. 4751). It also denied the motion to reopen (Tr. 4246, 4786). It ruled, against the unanimous testimony of expert witnesses, that a lesser frequency than three round trips per day per carrier would be operated (Tr. 4743).[*] And despite the clear language of Section 401 (f) of the Civil Aeronautics Act of 1938, 52 Stat. 987, that the Board may not limit the right of an authorized carrier to add to or change schedules, the Board proclaimed that it would obviate any uneconomic results of its decision by controlling the frequencies of the authorized carriers (Tr. 4743). No more consistently erroneous rulings can be imagined.

VII.

The Board has failed to apply valid statutory criteria.

Basic to a finding of public convenience and necessity for additional authorization is whether the proposed service can and will be provided by existing carriers. *United A. L., Red Bluff Operation,* 1 CAB 778. Herein the Board disregards that standard, because, faced with the argument that TWA and United not only could supply all the required service but also had committed themselves in their equipment planning, etc., to supply it, the Board rules as follows (Tr. 4743):

> ". . . where a carrier's preexisting plans for expansion of equipment and services are in conflict

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[*] This contention was advanced for the first time in American's briefs (Tr. 3921) in complete derogation of the testimony of its own senior vice president of traffic and sales (Tr. 1300).

> with route actions taken by the Board, the carrier must alter its plans in conformance with that action."

It is submitted that this conclusion places a premium not upon what the public may reasonably require, but upon an arbitrary number of carriers to meet those requirements, in derogation of the statute.

Similarly, the Examiner and Board failed to take cognizance of an important issue raised by TWA throughout the proceeding. Since the record showed (Tr. 557) that the aircraft proposed to be employed in San Francisco-New York nonstop service by American had been ordered for and could be utilized to full advantage on American's existing system, TWA urged (Tr. 3974) that the public interest considerations in maintaining adequate service in American's existing markets should be weighed.* At no point did the Examiner or the Board give any attention to this issue.

VIII.

The Board's supplemental proceedings compounded its previous errors.

Without repeating the assignments of error discussed *supra,* TWA urges that the Board's proceedings following its original final order involve wholly separate error in two fundamental aspects. First, the Board's conclusions reveal a tortuous resolution of many factual inferences against TWA and United; and secondly, the Board has completely misconstrued the issues posed and treated the case as an enforcement proceeding rather than one involving an issue of due process.

With respect to the first matter, it is to be borne in mind that TWA and United had no opportunity to produce evidence in support of their allegations of *ex parte* activity.

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* TWA pointed out as illustrative serious shortcomings in existing services of American between San Francisco and cities other than New York and pointed to the time lag required to secure expensive jet aircraft to meet those shortcomings (Tr. 3974).

When on reconsideration the Board ordered oral argument, it foreclosed any such opportunity and substituted the right to argue the inferences of fact to be drawn from the allegations. In recognition of this fact the Board at an early point in Order No. E-14664 stated (Tr. 5443):

> "We proceed upon the charges fairly alleged and base our decision upon the nature, rather than the number of the activities specified. . . ."

The Board, however, quickly abandoned this standard. Numerous undenied allegations of TWA and United are rejected because of a *lack of compelling proof*. For example, the fact that Congressmen received copies of American's motion would not be imputed to American (Tr. 5450). Also, American's request of November, 1957 that San Francisco "keep hammering" for an early hearing because a decision on that issue was due December 1, 1957 is interpreted (Tr. 5450) as a request for "vigorous participation within the confines of the rules" and, states the Board, any other interpretation "strains credulity"; yet the Board has not indicated, and TWA cannot visualize, how such "hammering" could be undertaken within the rules when the matter already stood submitted to the Board. Similarly, activities of American's employees on behalf of American's position are not imputed to American (Tr. 5452).*

Obviously, if the impelling *prima facie* showing of TWA and United, largely undenied, left any doubt with respect to the widespread disregard of rules and principles, the Board could have stayed its order and resolved these doubts by evidence. It chose not to do so, and thus exhibited a callousness to the vindication of the fairness of its own procedures.**

On the second point, it appears evident that the Board has not applied prevailing law. In a proceeding in which fair hearing is denied, the resultant order is void. *Inter-*

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* In sharp contrast to this type of fact-finding the Board rejects as "unpersuasive" TWA's verified allegations that no notice was had of the *ex parte* submissions until after the matter stood submitted to the Board (Tr. 5457).

** Never before did the Board issue a defeasible certificate.

state Commerce Commission v. *Louisville & Nashville Railway Co., supra.* Neither in that case nor in *Morgan* v. *United States, supra,* was any question posed of imposing sanctions upon the Commission or the Secretary of Agriculture, respectively; rather the basic consideration there, as here, was whether fair hearing had been accorded.*

The Board, however, assumed otherwise. It speaks of mitigation (Tr. 5443) "technical nature of the alleged misconduct" (Tr. 5445) "an abuse [which] warrants discouragement but not the deprivation of the authorized air service" (Tr. 5448) "sanction" (Tr. 5449), etc., and finally concludes (Tr. 5449) that the violations of rules and regulations, while established in substantial degree, should be condoned. Whatever its discretion in enforcement or similar proceedings, the Board has no such power when the rights of adversary parties are at stake. *It plainly and simply cannot condone a lack of due process.*

Conclusion.

For all the reasons hereinbefore detailed, the orders under review should be set aside.

Respectfully submitted,

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January 18, 1960.

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* True, the conduct disclosed herein might be such as to disqualify American, but no such finding need be reached to conclude that TWA's and United's interests were fatally prejudiced by the conduct of the proceeding.

Appendix I.

A. Pertinent provisions of the Civil Aeronautics Act, 52 Stat. 973, as amended.

"CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

"CERTIFICATE REQUIRED

"SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority [Board] shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

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"ISSUANCE OF CERTIFICATE

"(d)(1) The Authority [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

• • • • • •

"AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

"(h) The Authority [Board] upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, * * *. Any interested person may file with the Authority [Board] a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

* * * * * *

"CONDUCT OF PROCEEDINGS

"SEC. 1001. The Authority [Board] may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. No member of the Authority [Board] shall participate in any hearing or proceeding in which he has a pecuniary interest. Any person may appear before the Authority [Board] and be heard in person or by attorney. Every vote and official act of the Authority [Board] shall be entered of record, and its proceedings shall be open to the public upon request of any interested party unless the Authority [Board] determines that secrecy is requisite on grounds of national defense.

* * * * * *

"POWER TO TAKE EVIDENCE

"SEC. 1004. (a) Any member or examiner of the Authority [Board], when duly designated by the Authority [Board] for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Authority [Board]. In all cases heard by an examiner or a single member the Authority [Board] shall hear or receive argument on request of either party.

* * * * * *

"JUDICIAL REVIEW OF AUTHORITY'S ORDERS

"ORDERS OF AUTHORITY SUBJECT TO REVIEW

"SEC. 1006. (a) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore. *(Amended May 24, 1949, 63 Stat. 107.)*

* * * * * *

"POWER OF COURT

"(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Authority."

B. Pertinent provisions of the Civil Aeronautics Board Principles of Practice.

"PRINCIPLES OF PRACTICE OF THE CIVIL AERONAUTICS BOARD

"300.1 *Judicial Standards of Practice.* In many respects the functions of the Board are similar to those of a court and parties to cases before it and those who represent such parties are expected to conduct themselves with honor and dignity. By the same token, the members of the Board, and those of its employees who participate with the Board Members in the determination of cases upon a record, are expected to conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff. The standing and effectiveness of the Board are in direct relation to its observance, that of its staff, and the parties and attorneys appearing before it, of the highest standards of judicial and professional ethics.

"*300.2 Hearing Cases—Improper Influence.* It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases—

> "(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.
>
> "(b) It is likewise improper that there be any private communication on the merits of the case to a member of the Board or to the examiner in the case by any members of the Board's staff who participated in the hearing as witnesses or as counsel.
>
> "(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case."

C. Pertinent Provisions of Civil Aeronautics Board Rules of Practice

"PART 302—RULES OF PRACTICE IN ECONOMIC PROCEEDINGS

"SECTION 302.14—*Participation in hearings by persons not parties.* Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned.

* * * * * *

"§302.24(j) *Receipt of documents after hearing.* No document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the Examiner.

* * * * * *

"§302.26 *Proposed findings and conclusions before the Examiner or the Board.* Within such limited time after the close of the reception of evidence fixed by the Examiner, any party may, upon request and under such conditions as the Examiner may prescribe, file for his consideration briefs to include proposed findings and conclusions of law which shall contain exact references to the record and authorities relied upon. The provisions of this section shall be applicable to proceedings in which the record is certified to the Board without the preparation of an initial or recommended decision by the Examiner.

* * * * * *

"§302.31 *Briefs before the Board.* Within such period after service of any initial or recommended decision of an Examiner or tentative decision of the Board, as may be fixed therein, any party to a proceeding may file a brief before the Board in support of his exceptions to such decision, or in opposition to the exceptions filed by any other party. In cases where the Board or the Examiner is of the opinion that, because of the limited number of parties and the nature of the issues, the filing of opening, answering and reply briefs will not unduly delay the proceeding and will assist in its proper disposition, the Board or the Examiner may direct that the parties file briefs at different times rather than at the same time. Except by special permission of the Board or the Chief Examiner, briefs shall not exceed fifty (50) pages in length and reply briefs will not be received."

D. Pertinent Provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001, et seq.

"PUBLIC INFORMATION

"SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of any agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addresses to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

• • • • • •

"ADJUDICATION

"SEC. 5.(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

"(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

* * * * * *

"HEARINGS

"SEC. 7.(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant [sic] immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

"(d) Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

* * * * * *

"Decisions

"Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

"(a) Action by Subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject [sic] to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

"(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * * *

"JUDICIAL REVIEW

"SEC. 10. Except so far as (1) statutes preclude [sic] judicial review or (2) agency action is by law committed to agency discretion——

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * * *

"(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * * *

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provision, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

BRIEF FOR PETITIONER UNITED AIR LINES, INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15414

UNITED AIR LINES, INC.
Petitioner,
v.
CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC., CITY AND
COUNTY OF SAN FRANCISCO,
Intervenors.

On Petition for Review of Orders of the Civil Aeronautics Board

United States Court of Appeals
For the
District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Whether private communications on the merits of this case were directed to a member of the Civil Aeronautics Board or its staff or Examiner, or an effort made by a person or persons interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon it or its staff, which require that the certificate of public convenience and necessity to American Airlines, authorizing it to engage in nonstop air transportation between New York and San Francisco, be set aside and the proceedings in respect thereto be reopened.

2. Whether the following actions of the Civil Aeronautics Board, considered from the standpoint of either their separate or their cumulative effect, deprived petitioner of due process of law and the fair hearing guaranteed to it by the Administrative Procedure Act and the Federal Aviation Act:

(a) Refusal to direct production of a report prepared by the Board's Bureau of Air Operations for consideration by the Board in this proceeding, and requested by petitioner for use in preparation of its case, and cross-examination of the Bureau's witness;

(b) Denial to petitioner of an amount of time for oral argument sufficient to enable petitioner to make a fair presentation of its case;

(c) Failure of a Board member casting a decisive vote to hear oral argument;

(d) Failure by two members of the Board's three-member majority to set forth in the Board's opinions the reasons for their departure in this case from opinions expressed by them in prior proceedings; and

(e) Announcement by the Board of its vote by a press release prior to preparation and issuance of its formal opinion findings and order in the proceeding.

3. Whether denial by the Board of petitioner's motions to reopen the record for receipt of competent relevant material evidence of actual operating costs and characteristics of jet aircraft, not available at the time of hearing, constituted an abuse of discretion or otherwise deprived petitioner of its right to a fair hearing.

4. Whether the record upon which the order of the Board purports to be based is fatally defective, in that the record is devoid of reliable and probative evidence as to the operating costs and characteristics of jet aircraft, which evidence was both available to the Board and necessary for a determination by it of the economic effect and feasibility of nonstop operations in the San Francisco-New York market by three air carriers.

5. Whether the Board's finding and conclusion that the grant of San Francisco-New York nonstop authority to American is required by the public convenience and necessity are arbitrary, capricious, unsupported by necessary underlying findings and not supported by substantial evidence in the record as a whole.

6. Whether the findings and conclusions upon which the ultimate finding of public convenience and necessity by the Board is based are arbitrary, capricious and not supported by substantial evidence in the record as a whole.

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IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15414

UNITED AIR LINES, INC.,
Petitioner,
v.
CIVIL AERONAUTICS BOARD,
Respondent,
AMERICAN AIRLINES, INC., CITY AND
COUNTY OF SAN FRANCISCO,
Intervenors.

On Petition for Review of Orders of the Civil Aeronautics Board

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JURISDICTIONAL STATEMENT

Separate petitions filed by United Air Lines, Inc., and Trans-World Airlines, Inc., seeking review of respondent Civil Aeronautics Board Orders E-14412, E-14586 and E-14644, purporting to grant a certificate of public convenience and necessity to American Airlines, Inc., have been consolidated by this Court for the purposes of briefing, argument, decision and all other procedural matters.

Petitioner, United Air Lines, Inc., is an air carrier holding certificates of public convenience and necessity issued by the Board under the Aviation Act of 1958, as amended, 72 Stat. 737, *et seq.,* 49 U.S.C. 1301, *et seq.,* or its predecessor, the Civil Aviation Act of 1938, which would be adversely affected by its proposed award to American.

The jurisdiction of this Court is invoked under Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486, and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009.

STATUTES AND PRINCIPLES AND RULES OF PRACTICE INVOLVED

The statutes involved are the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486, and the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009, the pertinent provisions of which are set forth in Appendix A, *infra.*

The Principles of Practice and Rules of Procedure involved are those of the Civil Aeronautics Board, the pertinent provisions of which are also set forth in Appendix A, *infra.*

STATEMENT OF THE CASE

This is a consolidated proceeding involving consideration by the Civil Aeronautics Board (Board) of applications of both American Airlines, Inc. (American) and Northwest Airlines, Inc. (Northwest) to provide additional nonstop service between San Francisco/Oakland (San Francisco) and New York/Newark (New York). The New York-San Francisco route is the single most important traffic segment on United's system. It accounts for 7% of United's revenue passenger miles and has accounted for approximately $16,700,000 of its annual passenger revenues (Tr. 3324-26). It is of comparable importance to TWA (Tr. 3331).

Procedural Chronology

In Docket No. 1841, commonly referred to as the *Denver Service Case,* American sought and on November 4, 1955 was denied by a unanimous Board the right to provide San Francisco-New York nonstop service. On December 30, 1955 American's Petition for Reconsideration was likewise denied.

Within less than 18 months thereafter, American moved for an expedited hearing on that portion of its application in Docket No. 5903 through which American also sought to provide for its entry into the San Francisco-New York nonstop market (Tr. 5-21).

On June 26, 1957 this motion was denied. The Board at that time, however, directed its Bureau of Air Operations to "review the problem of the air service pattern between San Francisco and New York and report the results of that study to the Board on or about December 1, 1957" (Tr. 129-30).

Such a report was made sometime in December, 1957, United being denied access to or any information of its contents (Tr. 641, 670-71, 2023-24).

On January 13, 1958, a closely divided board reversed its earlier position and directed an expedited hearing on American's application (Tr. 136-38).

Petitioner and others were thereafter permitted to intervene (Tr. 687) and Northwest's application to provide San Francisco-New York nonstop service was consolidated for consideration with the application of American (Tr. 709-10).

Evidentiary hearings were conducted by an Examiner on July 30-31 and on September 9-18, 1958. The Bureau of Air Operations, which had earlier prepared for the Board the aforementioned air service pattern report, participated in these hearings, presenting certain traffic data, but taking no position on the need for additional service prior to the filing of its brief with the Examiner, when for the first time it supported the application of American. Either United or TWA on four separate occasions unsuccessfully sought to obtain information as to the contents of the Bureau's report to the Board; both for the purpose of being able to fairly address themselves to the considerations which led the Board to grant American's motion for an expedited proceeding, and for the purpose of being able to address themselves to any inconsistencies which might exist between the position of the Bureau in its report to the Board and the position taken by it in the hearing before the Examiner. The first of these requests was denied by the Board (Tr. 641) January 13, 1958, and the latter three by the Examiner (Tr. 670-71, 2023-24).

On February 18, 1959, prior to the issuance by the Examiner of his Initial Decision, petitioner moved that the record be reopened for the purpose, among others, of receiving evidence of actual jet operating costs (Tr. 4047-57). This evidence had become available only after the close of the hearing (Tr. 4050-54). Despite the admonition of the Board in its Order granting an expedited hearing that the applicants and intervenors should give careful consideration in their exhibits to the effects of their planned operation of jet aircraft in the market, and the direction by the Board to the Examiner that he should "make specific findings on this issue" (Tr. 136), petitioner's motion was denied (Tr. 4081). It was renewed to the Board and again denied by it (Tr. 4752).

On March 9, 1959, the Examiner issued his Initial Decision finding that the public convenience and necessity required a third nonstop carrier between San Francisco and New York and that American should be authorized to provide this service (Tr. 4139).

Oral argument was held on April 29, 1959, and on May 15, 1959, the Board issued a press release announcing that it had tentatively voted three-to-two to grant American's application (Tr. 4729).

The Board's formal Opinion and Order E-14412 here under review was adopted on September 2, 1959, and again by a three-to-two vote, the Board purported to authorize

American to conduct San Francisco-New York nonstop service (Tr. 4730-91).

On October 27, 1959, the Board in its Order E-14586 ordered further oral argument "to determine whether and to what extent the allegations of violations of the Principles of Practice and Rules of Practice justify further action in this proceeding * * *," but otherwise denied the petitions for rehearing, reargument and reconsideration (Tr. 5332-37).

On November 19, 1959, the Board issued its Opinion and Order No. E-14664 finding that both San Francisco and American had violated the Board's Principles and Rules of Practice but denied petitions of United and Trans World for reconsideration (Tr. 5435-65).

The Violations by American and San Francisco of the Board's Principles and Rules of Practice

Throughout the entire course of the Board proceeding, both American and the City of San Francisco sought to bring pressure and influence to bear upon the Board in an effort to sway its judgment, either by directly addressing ex parte private communications to the Board upon the merits of the case, or by causing such communications to be sent to the Board by persons of either political or public prominence (Interspersed with other matter Tr. 165-576). San Francisco employed a professional lobbyist in this connection and publicly announced that its strategy would be to have elected representatives from Northern California and administrative officers carry the ball and put pressure on the Civil Aeronautics Board.

The President of the San Francisco Public Utilities Commission stated in turn as follows:

> "The Civil Aeronautics Board members have 'iso-

> lated' themselves from influence by mail or wire. Our only recourse is to subject them to the same perfectly legitimate pressures that they get from the lobbyists of other cities. We have reason to believe that this city has not gotten all it might from the Civil Aeronautics Board because the city has not used this kind of pressure before." (Tr. 5468)

Known results of the foregoing campaign are a series of over 120 communications found in the Board's correspondence file (Interspersed with other matter Tr. 165-576). They include letters received directly from or transmitted to the Board from:

1. The Mayor of San Francisco;
2. The President of the San Francisco Public Utilities Commission;
3. At least 39 different Congressmen;
4. At least nine different Senators;
5. Two Governors and a Lieutenant Governor;
6. A member of the Executive Committee of the Republican National Committee;
7. An Assistant to the President of the United States;
8. The President of the California Republican Assembly;
9. Numerous travel agents and municipal and civic bodies.

Ten of the Senators or Congressmen from whom communications were received were members of either Appropriations or Ways and Means Committees; eight were members of Commerce Committees. This correspondence shows that at least 12 letters were written by the Mayor of San Francisco to members of Congress soliciting such support; another three by the President of the San Francisco Public Utilities Commission; one by the professional lobbyist employed by San Francisco and one by the Chairman of the Mayor's Shipping Committee. At least seven such communications were written at the direction of American by travel agents located in seven different cities on both the East and West Coasts (Tr. 5145-51). They were written to the Board or to members of Congress who transmitted them to the Board.

The initial effort of American and San Francisco was to secure an expedited hearing upon American's application. Such a hearing was ultimately obtained. It resulted in the submission of cost estimates which were based in large part upon manufacturers' estimates (Tr. 1289-91), and the submission of traffic forecasts which were made without the benefit of any actual information as to how jets would affect traffic in this market. Had the case not been heard out of turn, actual jet costs would have been available, as well as traffic figures indicative of the actual effect of jet transportation upon traffic volumes, both of them considerations of primary importance in determining the economic practicality of three-carrier competitive service.

Neither American nor San Francisco were ignorant of the Board's Principles and Rules of Practice. In the case of American, it had the benefit of numerous statements made by the Board on this subject in other route cases (Tr. 5122-23). In the case of San Francisco, it early received information on the subject in the form of a direct rebuke by the Chairman of the Board and an admonition that its activities in this respect must be stopped (Tr. 5447, 5468, 5470, 5471). This action was taken at a meeting of the Board on December 2, 1957, granted at the request of San Francisco for the single purpose of discussing San Francisco's general aviation problems. A transcript of the proceeding shows that despite the stated purpose of the meeting, San Francisco's remarks were directed to the alleged need of additional San Francisco-New York nonstop service (Tr. 5472-80). Following this meeting and the warning given, San Francisco continued to solicit the ex parte support of members of Congress, the support it sought being not general support for additional service but rather support for the specific application of American. American's efforts were also continued, three of its directed travel agents' letters urging congressional support of American's application being written in this period.

The Issue of a Fair Hearing

In its order of expedition (E-12103, Tr. 136-38) the Board said:

> "An important factor supporting this decision is the opportunity that will be provided for the Board's first full-scale investigation of the imminent impact of the operation of jet aircraft in a market of the size and importance of that involved here. It is clear that this aspect of the industry will become increasingly important to the Board's regulatory processes in the next several years. This proceeding can provide material that would be of great value to the Board in this respect. It is expected, therefore, that the applicants and intervening carriers will give careful consideration in their exhibits in this case to the effects of their planned operation of jet aircraft in this market, and we direct the examiner to make specific findings on this issue, in determining whether the public convenience and necessity requires additional nonstop service in the markets in question" (Tr. 136).

Evidentiary hearings were concluded before jets were placed in operation by American, TWA or United, either in the San Francisco-New York market or elsewhere. As heretofore stated, cost estimates were predicated upon estimates provided by plane manufacturers and by carrier conjecture as to how jet planes could be operated by them (Tr. 1289-91, 2531, 2534, 2535, 3327, 3330). Traffic estimates were related to past growth trends, with additional allowances made for the stimulation which it was anticipated that jet planes would provide (Tr. 2539, 3331-32).

Prior to the issuance by the Examiner of his Initial Decision, actual jet operations provided information with respect to costs, which information was not available when hearings were held. United moved that the record be reopened for the admission of this evidence (Tr. 4047-57). Specifically, it called to the attention of the Examiner the fact that American had added a third pilot to its 707 crew and a fourth stewardess (Tr. 4050-51). It also called attention to public statements made by officials of American that jet costs were higher than anticipated (Tr. 4051). This motion was denied by both the Examiner and the Board (Tr. 4081, 4752). At the time of its denial by the Board, additional evidence of increasing jet costs was available. It was called to the attention of the Board and referred to by the minority in its dissenting opinion (Tr. 4776-79). American had publicly announced its plans to convert its 707s to turbo fan engines at a cost of approximately $40,000,000 commencing in 1960. The 707 had been found to be 30 miles an hour slower than anticipated. Nonstop flight time had been found to exceed the schedules proposed by American. Current official published schedules now show that American's forecast eastbound time has been increased from 4 hours, 45 minutes (Tr. 2554) to 5 hours, its proposed westbound time from 5 hours, 45 minutes (Tr. 2554) to 6 hours, 10 minutes.

In addition to its refusal to reopen the record, the Board denied the petitioners access to the report made to it by the Bureau of Air Operations on the problem of the air service pattern between San Francisco and New York, which report was requested for the express purpose of enabling the Board to determine whether an expedited proceeding should be ordered.

On oral argument United, over its objection, was granted only 30 minutes of time within which to present its position on all issues of this case, with TWA receiving a similar time allotment (Tr. 4245). This compares with a total time allotment of 4 hours, 20 minutes (Tr. 5139) for parties advocating third carrier service. It also compares with time allotments of 40 minutes apiece (Tr. 5343) granted to United and TWA on later argument to the Board of the single issue of whether violations of the Board's Principles and Rules of Practice justified further action by the Board.

Member Hector, whose vote was necessary to the majority decision and who exhibited particular interest in the impact of jet operations, was not present at the time of oral argument.

Members Gurney and Minetti who, together with Member Hector made up the three-man Board majority, have taken a position in this case at direct variance with views only recently expressed by them, views called to their attention by petitioner in brief and on oral argument (Tr. 5141-42). They have chosen nevertheless to remain silent as to the reasons for their change of position and have thus deprived petitioner of any opportunity to address itself to the considerations which produced that change.

Member Gurney, in a dissenting opinion in the *Great Lakes-Southeast Service* case, Docket No. 2396, stated:

> "* * * because of the impact of the forthcoming new era in air transportation, the Board should not now authorize additional competition over competitive routes where the competing carriers have definite plans

> to operate jet equipment. The existing carriers should be given the opportunity to inaugurate their jet flights without excessive competition. This decision does not provide the existing carriers on this route with the most healthful climate to embark on the jet age. To this end, the Board has not met its responsibility to 'foster sound economic conditions' in the industry."

His position was reaffirmed on May 7, 1959.

Member Minetti, in the *Eastern Route Consolidation* case, Docket No. 3292, in his dissenting opinion of April 1, 1957 said "the Board's frequently stated objective of achieving and maintaining competitive balance between traffic line carriers is of paramount importance to the public as well as to the carriers themselves," and the award would defeat that objective and "further increase American's dominant position in the industry."

The decision of the Board was first announced in the form of a press release. The validity of such a decision is presently being considered by the United States Court of Appeals for the Second Circuit, *Eastern Airlines* v. *C.A.B.*, Case No. 45,442, et al.

The Findings and Order of the Board

The Board found and concluded that

> "An additional nonstop carrier was required to assure the provision of the type and quantity of service to which the market was entitled and to provide the necessary competitive spur to develop the market" (Tr. 4735).

The facts are these:

Type of Service. American proposed and has provided service with Boeing 707 Jets (Tr. 2526-28), the identical plane with which service was proposed and is being supplied by TWA (Tr. 3095). United provides service with Douglas DC-8s, a plane having comparable size, speed and operating characteristics (Tr. 4147). All planes provide a mixed configuration and carry both first class and coach passengers. The portions of the plan devoted to each class of passenger can be increased or decreased, depending upon the relative demand for first class or coach service.

Quantity of Service. Each carrier testified that the market required service at three times of the day, and each proposed to supply three daily roundtrip flights (Tr. 1275-76, 1330-31, 2526-28, 3095, 3184-85, 3215-16, 3261, 3500). On brief, American for the first time suggested that the economics of three-carrier competitive service might require that in the off-peak winter season the daily number of flights by each carrier be cut to two (Tr. 4462-63). This suggestion was viewed with favor by the Board in its opinion, and its conclusions with respect to the economic impact upon United and TWA of third carrier service were predicated upon the assumption that in the off-peak season San Francisco-New York passengers would receive service at fewer times of the day than they would receive if American were not granted a certificate (Tr. 4743-44).

American neither proposed nor has provided service except at hours which are virtually identical with those at which service is being provided by United and TWA.

Development of the market. The Board found that the past service provided by United and TWA was legally adequate (Tr. 4744). It adopted the Examiner's finding (Tr. 4120) that the market had been properly developed. It concluded, however, that mere adequacy did not fully meet the needs of the public in this market (Tr. 4744-47). In considering what these needs might require, it concentrated its attention not upon the service which United and

TWA were giving at the time of the hearing or proposed to give upon receipt of their jets, but rather upon the service provided during a limited portion of 1957 when United and TWA suffered from a temporary shortage of long range equipment (Tr. 4745).

The reasons for the temporary inability of United and TWA to fully satisfy such demands were these: DC-7s and Constellations were the first commercial planes capable of providing economically feasible transcontinental nonstop service. United placed its first order for DC-7s in 1952. Deliveries commenced in May, 1954 (Tr. 3208). United inaugurated San Francisco-New York eastbound service on June 1, 1954 (Tr. 3208). A second service was inaugurated on August 1.

When the first DC-7 orders were placed by both United and American, it was not known whether or not transcontinental nonstop flights would be possible. The capability of the plane to fly nonstop was recognized, but both Civil Air Regulations and collective bargaining agreements between United and representatives of its flight crews prohibited flight personnel from being scheduled to fly more than 8 hours in any one day. It was not until June 14, 1954, that the Civil Air Regulation was waived, and not until May 1, 1955 that the necessary modification was made in the last of United's collective bargaining agreements (Tr. 3383, 3406A).

With waiver of the flight time regulation and the knowledge gained of the flying characteristics of the DC-7 through their actual operation, United, early in 1955, placed a large order for additional planes. These planes were not available for delivery until the first and second quarters of 1957 (Tr. 3209), however, except for one delivered late in 1956, and load factors for a limited period of time in the early part of 1957 on some nonstop flights, prior to the time that new equipment was ready for use, were unavoidably high.

The contention was made by San Francisco and American that the additional nonstop service provided by United and TWA in 1957 was inspired by American's motion for an expedited hearing of its pending application. The undisputed facts are that on March 21, 1957, approximately one and a half months before the date of American's motion, United filed its official May, 1957 schedules with the Board. On April 4 it transmitted its May schedules to the Official Airline Guide for publication. These schedules provided for an increase in United's San Francisco-New York nonstop frequency to three roundtrips on April 1, 1957, and four roundtrips on June 27, 1957 (Tr. 3214, 3276). Similarly, TWA, as early as November, 1956, committed itself to the operation of three nonstop roundtrips by September, 1957 (Tr. 3181-82, 3189). United and TWA's average nonstop load factor declined to 72% in September of 1957, and to 56% in November of that year (Tr. 3204). At all times thereafter San Francisco-New York nonstop load factors averaged below those prevailing between Los Angeles and New York, the latter service being that to which American and San Francisco sought to compare San Francisco-New York service (Tr. 3204). Between May, 1957 and July, 1958, empty seats on San Francisco-New York nonstop flights averaged between 121 and 328 per day (Tr. 3205). TWA operated both eastbound and westbound nonstop coach flights as early as the summer of 1956, and United provided nonstop coach service in both directions beginning on April 1, 1957 (Tr. 3209, Official Airline Guide September 1956, April 1957).

As for the general character of the service provided by United to San Francisco, the record shows that San Francisco has consistently been the first city to receive each type of new aircraft and each new service operated by United (Tr. 3253-54, 3324). This includes United's first DC-3 transcontinental service, its first DC-4 transcontinental one-stop service, its first DC-6 transcontinental service, its first all cargo service, its first DC-7, its first transcontinental nonstop, its first custom coach service, and its first jet service (Tr. 3253-54).

For the purposes of its decision and particularly determination of the economic impact of the addition of third carrier service, the Board has assumed that the San Francisco-New York nonstop market would produce on the average of 1,000 passengers a day in 1960. This figure was reached by using as a base the total number of single carrier local and connecting passengers moving between New York and San Francisco, as shown in the Board's traffic surveys for 1957. This base was then adjusted to allow for an anticipated average 10% annual traffic growth for the three-year period 1957-1960, plus an additional 10% to reflect jet stimulation in the market in 1960 (Tr. 4738-41).

The Board's figures make no allowance for the following considerations:

> Prior to April, 1958, a traveler could buy a ticket from New York to Los Angeles, travel from Los Angeles to San Francisco at no extra cost, and then return to New York from San Francisco. Such a ticket was counted in the Board's Survey as two New York-San Francisco one-way tickets (Tr. 3537, 4738), although the New York-Los Angeles flight in no way represents traffic available for support of the San Francisco-New York market.
>
> Overseas carriers with polar routes are siphoning off a substantial amount of the overseas traffic that originally moved from San Francisco nonstop to the New York gateway (Tr. 3195, 3226).

> No carrier has proposed to carry excursion traffic on jets, estimated by TWA to represent 10% of the San Francisco-New York market (Tr. 3133-34, 3147). The Board, however, included such traffic in its estimates of the potential size of the nonstop market (Tr. 4739).
>
> As regards the anticipated 33% traffic growth in the period 1957-1960 (Tr. 4740), the Board's traffic surveys show that instead of a traffic gain in 1958, there was a decline of 5.69%. There was no showing or contention by any party before the Board that this 1958 loss was being picked up in 1959.

To handle the traffic to be produced by the San Francisco-New York market in 1960, United and TWA will each provide three roundtrip flights a day. These flights will supply 1344 seats per day, which would leave 344 empty seats a day even if the Board's traffic estimates were realized. If American were permitted to enter the market, and if it provided a comparable amount of service, as its witnesses testified that it would do, a total of 2,016 seats per day would be provided for that same number of passengers.

Diversion. The Board has found that grant of a cerficate to American would divert revenues from United and TWA in the sum of almost twelve million dollars in the year 1960, with United bearing somewhat more than half of the burden (Tr. 4126, 4747-48). This would be the equivalent of approximately 45% and 273% of their respective 1958 domestic net revenues (Forms 41, Tr. 3338).

The Economics of Nonstop Jet Operations by Three Carriers. The Board concluded that three nonstop carriers could "operate at above break even load factors" in 1960, that "after that normal traffic growth should soon permit operations by the three carriers on a more profitable basis" and that "ultimately we fully expect the sizeable growth potential of this rich and important long haul market will warrant the scheduling of additional frequencies by the three carriers" (Tr. 4743-44).

The Board, however, made no cost findings. It made no finding as to what the break even load factor would be for 1960 or subsequent years, its only reference being to a break even load factor estimate submitted by American for the year 1959 (Tr. 4743). It made no finding with respect to expenses or revenues for 1960 or later years.

United estimated that for the year 1960 third carrier service by American would transfer a total anticipated profit of $1,167,000 for United and TWA into a total net loss for those two carriers of approximately $3,679,000, with an additional loss to be sustained by American. United further estimated that net losses would continue for several years thereafter (Tr. 3327-29).

American's Historic Participation in the San Francisco-New York Market. In the Board's opinion, reference is made to American's historic participation in the total San Francisco-New York market (Tr. 4753). In the period 1952-1958 this participation ranged from 5.60% to 7.32%, except for the year 1954, in which its participation was 13.95% (Tr. 3419). Higher participation of American in 1954 resulted from the fact that it was the first carrier in the market to receive delivery of DC-7s and the only carrier which had them in service in the market for a substantial portion of that year.

STATEMENT OF POINTS

The Board erred in—

1. Refusing to set aside for violation of the Board's Principles and Rules of Practice by American and San Francisco, the certificate of public convenience and necessity authorizing American Airlines to engage in nonstop air transportation between New York and San Francisco.

2. Refusing to direct production of a report prepared by the Bureau of Air Operations for consideration by the Board in this proceeding, denying petitioner an amount of time for oral argument sufficient to enable it to make a fair presentation of its case, permitting a member of the Board to vote who did not hear oral argument, failing to set forth in its opinion the reasons for the departure therein of two members of the Board from opinions recently expressed by them in prior proceedings, and announcing its vote in a press release prior to preparation of its formal opinion, findings and order.

3. Denying the motion of petitioner to reopen the record for the receipt of competent relevant and material evidence not available at the time of the hearing.

4. Issuing a certificate of public convenience and necessity on the basis of a record which was devoid of evidence which was available and necessary to a proper determination of the issues.

5. Failing to make findings of fact necessary to an ultimate finding of public convenience and necessity.

6. Making findings of fact which are not supported by substantial evidence.

SUMMARY OF ARGUMENT

I.

American and San Francisco have each been found by the Board to have acted in violation of the Board's Principles and Rules of Practice. The violations were not of a sporadic nature or the result of mere ignorance or carelessness. They represent a continued course of action, initiated at the time that American sought consideration out of turn of an application to provide San Francisco-New York nonstop service and continued without cessation up to the time of oral argument two years later.

Both American and San Francisco sought to enlist the support of persons who, because of their importance, primarily in political life, might have been assumed to be in a position to influence the action of the Board. Their support was sought not in the form of evidence openly presented or argument made in accordance with Board rules, but rather in the form of private communications addressed to the Board or to individual Board members. In most instances the persons approached were not shown to have had any knowledge of the needs of the market or the economic impact of third carrier service, and their help could have been sought for no reason other than upon the assumption that their personal positions were such as to enable them to influence the Board's decision.

In the case of San Francisco, direct congressional support was solicited by the Mayor of San Francisco and other officials. In the case of American, travel agents who might be assumed to have expert knowledge of the needs of a market, were requested by American to write to members of Congress with the obvious intent of persuading such congressmen to use their influence on behalf of American.

The significance of these actions must be appraised in the light of the importance of the decisions which they were intended to influence.

II.

The Board, under constant pressure from American and San Francisco, was led throughout the entire proceeding to take a series of actions which made it impossible for United to offer evidence which was necessary to a proper determination of the issues presented by the case and, further, made it impossible for United to fairly present its position on the evidence which was being considered by the Board.

The basic ultimate question to be decided by the Board was whether the market was large enough to call for and support duplicating jet service by three carriers. American had had its day in court and an opportunity to plead its interest in the San Francisco-New York market as late as December, 1955. Other carriers and other cities were pressing for consideration by the Board of their long pending applications for new or additional service when American, in May, 1957, moved that its continuing effort to enter the San Francisco-New York nonstop market be given preferred attention. After initially denying this motion, the Board directed its Bureau of Air Operations to study the matter and report back to the Board its findings. Such a report was made and, obviously, influenced the Board in its reversal of its former position. United was denied any information as to what this report contained and was unable to state its own position on the issues which obviously influenced Board action which was of vital importance to United.

The expedited hearing obtained by American enabled it to obtain a decision based only on estimates as to what jet costs might be, and how jet operations might affect traffic volumes, flight frequencies, etc. Had American's application not been considered out of turn, actual knowledge of the effect of jet operations would have been available to the Board prior to the time for its decision. In a proceeding where the certification of third carrier service would admittedly take from United revenues in excess of $6,000,000 a year, United was at least entitled to know what facts the Board would consider in ariving at its decision and to state its own position on them.

Some information regarding the actual characteristics of jet operations, particularly in the area of costs, became known even before the Examiner issued his Initial Decision, and a very substantial amount of information was available prior to the time that the Board heard argument. United was denied an opportunity to present it. The Board's order of expedition which directed a searching inquiry into the impact of the operation of jet aircraft, as well as protection of United's right to a fair hearing, certainly required that the Board, at least to the extent possible, base its decision upon known facts and not upon speculation. The Board has consistently refused to accept that obligation.

Additional actions taken by the Board might or might not, individually, constitute sufficient grounds for setting aside the Board's order, but their cumulative effect is more than enough to do so. They indicate a continuing lack of interest on the part of the majority in anything that United might have to say and virtually a predetermination before hearing that a certificate would be granted to American. United, over its objections, was given only 30 minutes in which to present oral argument, the complete inadequacy of which can be easily judged by this court when it is recognized that the issues presented here on review are far narrower than the issues presented to the Board. One of the deciding votes was cast by Member Hecter who was absent at the time of oral argument. It was he who earlier had stressed the necessity of obtaining knowledge of the actual characteristics of jet operations and his presence at the time of the hearing might reasonably be expected to have lead to a fuller discussion of those issues and the record's deficiencies with respect thereto. Members Gurney and Minetti, the two remaining members of the three-man majority, only shortly prior to the decision of this case, had each rendered opinions the philosophy of which was at direct variance with the position taken by them in this proceeding. There has been no explanation of the reasons leading to their departure from previously expressed views, a further indication that the Board majority has not been interested in the position taken by United on the issues of this proceeding or willing to permit United a fair opportunity to present that position.

III.

Necessary to the Board's decision was substantial evidence that the San Francisco-New York nonstop market both needed and could support third carrier service. The findings actually made are insufficient as a matter of law to support the conclusions of the Board, and there is no substantial evidence in the record to support even those findings upon which the Board's conclusions were presumably based.

On the question of need, it is admitted that American would not provide service to a single passenger at any time of the day or on any type of equipment that would not already be provided by United or TWA. There is no finding to the contrary. If there is a need for added service, it must be found in the purely philosophical advantages of multiple competition.

And of equal importance as the need of a market for additional service is the ability of the market to support that service. The Board has made no findings as to what the cost of jet operations would be, and without a finding of what costs would be in a three-carrier market, there can be no valid finding that the market can support the additional service offered by American. It is not enough for the Board to conclude that three nonstop carriers could operate at above break even load factors, or that normal traffic growth should soon permit operations by three such carriers on a more profitable basis. Such conclusions must rest upon a concrete foundation of findings, and that foundation is lacking here.

The omission of these necessary findings is most likely explained by the fact that the evidence presented would not support findings which in turn would support the conclusions reached by the Board. Assuming the existence of the inflated traffic potential anticipated by the Board, the provision of three flights a day apiece, stated by each carrier to be necessary in order to provide adequate service and develop the market, would provide a total of 2,016 seats for a market of 1,000 passengers. The resulting load factors of less than 50%, on the basis of any cost indicated during the course of the proceeding, either actual or conjectural, would be disastrous, not only for United but for TWA and American, as well. By no line of reasoning nor rule of law can a market which cannot support an additional duplicating service be found entitled to receive that service.

ARGUMENT

The decision to be made by the court in this case is one of broad significance and major importance. It involves far more than the personal concern of United and TWA with the loss of revenues of $12,000,000 or more per year. At issue are the more important interests of the public in the preservation of its confidence in the integrity of our federal administrative agencies and in the establishment and enforcement of regulatory principles which will insure the development of a sound transportation system providing efficient service at reasonable charges. The Board has concerned itself with that small portion of the public represented by the San Francisco-New York nonstop market which would indulge itself in the luxury of an unneeded, economically destructive third carrier service to be subsidized by other users of air transportation. Totally ignored have been the interests of the great body of users of air transportation who would ultimately be required to bear the burden of added San Francisco-New York service in the form of higher fares or impaired over-all service.

The Violation of the Board's Principles and Rules of Practice

Not only does the absence of public convenience and necessity require that the certificate granted to American be set aside but, equally so does the conduct of American and San Francisco in their efforts to obtain a favorable Board decision. From the very outset of this proceeding they have shown themselves unwilling to rest that decision upon the merits of their case, presented in an open hearing. For two years each of them waged an unrelenting campaign to bring outside pressure to bear upon the Board. The details of that campaign have been outlined in petitioner's

Statement of Facts. It is sufficient to note for the purpose of this argument that two and a half years after the campaign was commenced the Board belatedly recognized in its opinion of November 19 that

> "The showing made in support of the petitions, in our judgment, indicates a strong likelihood that San Francisco, motivated by an excess of zeal and a lack of understanding of the precise bounds of our procedures, may have violated Rule 2" (Tr. 5445).
>
> ". . . it appears that San Francisco actually requested expressions of position outside the regulatory scheme. We further note that the Board has already had occasion to rebuke officials of San Francisco for a public statement relating to placing 'pressure' on the Board, and we think it particularly unfortunate that San Francisco's activities off the record only diminished rather than ceased after our warning" (Tr. 5447).
>
> "The allegations concerning solicitations of letters from travel agents by employees of American, however, do indicate some violation of the Rules . . ." (Tr. 5451).

Whether more or less than the 39 congressmen and nine senators from whom communications were received by the Board were persuaded by San Francisco to intercede, or whether American approached more than the seven travel agents who are known to have been persuaded by American to write to their congressmen, is not a matter of consequence in view of the statement of the Board that

> "We proceed upon the charges fairly alleged and base our decision upon the nature rather than the number of the activities specified, in view of the position of petitioners that further investigation would do no more than provide proof of the allegations or show matters entirely cumulative in nature" (Tr. 5443-44).

The position of the Board is, in substance, that conduct of the character in question, regardless of the extent to which engaged in, calls for no remedial action in the absence of concrete proof of corruption or the effectiveness of the conduct. Petitioner repeats what it has said before, that it accuses no member of the Board either of corruption or even of having consciously yielded to the pressures to which he was subjected, but petitioner further states that if the position of the Board is permitted to stand unchallenged by this court, it will equally undermine the confidence of the public in the Board and in its procedures. This Court has played the leading role in recent efforts to correct agency procedures. It made no qualification such as that which the Board would impose when the court said, in the case of *Sangamon Valley Television Corp.* v. *U.S.*, 358 U.S. 49 (1959):

> ". . . Accordingly the private approaches to the members of the Commission vitiated its action and the proceeding must be reopened."*

If the obligation of parties in interest to observe the principles and rules of practice of a federal agency is in fact to be no more than a qualified obligation, this court should make the exact nature of that obligation and its qualifications clear.

In support of its decision, the Board has offered a number of explanations which are both unrealistic and untenable.

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* See also *Sangamon Valley Television Corp.* v. *U.S.* (App. D.C. 1959), Case No. 13992, . . . F. 2d . . . (after remand); *WIRL Television Corp.* v. *U.S.*, 358 U.S. 51 (1958); *WORZ, Inc.* v. *F.C.C.*, 358 U.S. 55 (1958); *WORZ, Inc.* v. *F.C.C.* (App. D.C. 1959), Case No. 13996, . . . F. 2d . . . (after remand); *WKAT, Inc.* v. *F.C.C.* (App. D.C. 1958), 258 F. 2d 418; *Massachusetts Bay Telecasters, Inc.* v. *F.C.C.* (App. D.C. 1958), 261 F. 2d 55.

It has suggested that the opportunity to solicit congressional support in an open hearing in some way justifies the solicitation of a private approach (Tr. 5452). Carrying that suggestion to its logical conclusion would mean that the right of counsel or a witness to appear for a party in open court would justify the presentation of the same testimony or argument to a judge in private.

The Board has suggested that its Principles and Rules of Practice were perhaps so uncertain of meaning as to excuse their violation (Tr. 5440, 5442-43), but there was nothing uncertain in the rebuke administered to San Francisco by the Board as early as December 2, 1957, a rebuke which the Board itself has stated to have fallen on deaf ears (Tr. 5447). Neither was there any uncertainty in the statement made by the Board with respect to its Principles and Rules of Practice in such proceedings as *Air Transport Associates, Enforcement Case,* 14 CAB 805 (1951), *Chicago-Milwaukee Twin Cities Case,* Docket No. 3207, et al., and *Subsidy Mail Exemption Proceeding,* Docket No. 9376. With the foregoing proceedings American was well acquainted.

The Board suggests that the activities of American appear to have been carried on by lower echelon representatives (Tr. 5452-53). The idea that lower echelon representatives were inspired to take the same action in seven different cities is not only somewhat naive but, significantly, American, with full knowledge of what was done and by whom, filed no affidavits seeking to avoid responsibility for those actions.

Lastly, the Board suggests that while conduct aimed only at securing an expedited hearing was technically in violation if its rules, that particular violation was not one of great significance (Tr. 5442-43). On the contrary, the decision to give preferential treatment to American's application was one of the most significant decisions which the Board had to make, for upon that decision rested the question of whether the ultimate order of the Board would be based upon known facts of jet operations or merely upon speculation and conjecture.

Petitioner Was Denied a Fair Hearing

Evidence of the probable effect of the pressure applied against it, however unconscious it may have been, is found in the conduct by the Board of this proceeding. The request by American for preferential treatment of its application was initially denied. This action was in line with the Board's normal procedures. There are only two circumstances which could reasonably explain the unusual reversal by the Board of this position. United and TWA were providing, as conceded by the majority, a substantial amount of nonstop schedules, and no question has ever been raised as to the sufficiency of the jet service which they proposed. Service, both current and prospective, could not have supplied a reason for the Board's decision.

In the period of six months which intervened between the date of the Board's original order and its subsequent reversal, the Board had been deluged with a flood of correspondence, and editorially abused by the San Francisco press. If this was the cause for its change of position, its decision was patently an improper one. If this was not the cause, only one other alternative would appear to exist, to-wit, the report made to the Board by its Bureau of Air Operations on the problem of San Francisco-New York service. The importance to United of having the issue of the need for additional service decided on the basis of known jet operating characteristics and costs rather than upon speculation and conjecture, is emphasized in other portions of this brief. Determination of that issue depended upon the decision of the Board to grant or deny American's request for preferential treatment. If United was entitled to be heard upon this issue, which was of such vital importance to it, then United was entitled to know what contentions or evidence motivated the Board's decision and to address itself to them. Absent knowledge of what the Bureau report contained, United was denied an opportunity to do so.

Knowlege of the contents of this report was also of importance to United in a second respect. At the time of the hearing the Bureau presented certain traffic and flight schedule data but took no position on the need for new service. Only after completion of the hearings and upon brief to the Examiner did the Bureau support American's application. Presumably, the report gave support to the position finally adopted by the Bureau. If so, United was entitled to know what were the grounds for the Bureau's position and to cross-examine its witnesses. If the report was inconsistent with the position finally adopted by the Board, United was equally entitled to examine with respect to such inconsistencies.

Of major importance to petitioner and also to all users of air transportation was a decision which took into consideration to the greatest extent possible the actual effect of jet planes on costs, frequency of service, and traffic volumes. Petitioner does not need to labor the point, long recognized, that in the publicly regulated transportation industry uneconomic duplicating service means no more in the long run than higher fares or poorer service for the public.

As pointed out by Member Hector, one of the three members of the Board majority, this proceeding is unique in that it presented none of the involved problems found in the ordinary route case. There was no question as to whether American should be permitted to provide an uneconomic San Francisco-New York nonstop service in order to provide service that would otherwise be denied to passengers on other portions of its system. This is the situation in the ordinary route case where the certificate sought relates to only a segment of the service which the certificate is intended to provide. This is the explanation for the grant of a large majority of the certificates to which American and San Francisco have heretofore referred in brief and on argument.

In the instant proceeding, American proposed to provide no service for any passenger on its system which would not already be provided by United or TWA. A bare bones issue was presented. Was multiple duplicating service needed and was it economically justified? The question was one which the Board could not determine on the basis of past performance. The San Francisco-New York nonstop market which American sought to enter is a market which will admittedly be served by only jet planes. The jet planes with which all carriers propose to serve this market carry twice the number of passengers as their piston-powered counterparts, and will, accordingly, mean fewer frequencies. Each plane will carry both first class and coach passengers in such proportions as the market will determine, leaving no option to the carrier as to the amount of each type of service which it chooses to provide. With passengers always looking for desirable times of departure and arrival, the added speed of the jet means that scheduling for jet planes will follow a different pattern from that which has prevailed in the past. And last but not least, the differing costs of jet planes, differing flight operations, etc., means different costs for the transportation of passengers on jet and on piston-powered planes.

United has felt strongly that a decision which would inevitably affect Board policy and the over-all economics of air transportation should await actual knowledge of what jet costs would be. Assuming, however, a discretion on the part of the Board to act without such knowledge, it seems clear that the Board was at least required to consider and act upon the most accurate knowledge available.

At the time of the hearing, the only evidence available was airplane manufacturers' estimates of costs, certain to be optimistic by their very nature, and carriers' speculation as to how jet planes could be operated and as to what traffic would be carried.

Even before the Examiner issued his initial decision, however, major upward changes became apparent in the anticipated pattern of costs. In particular, American had added a third pilot to its flight crew and a fourth stewardess. United called these publicly known facts to the attention of the Examiner and asked that the hearing be reopened in order to consider what effect they would have on American's cost estimates. The motion was denied, renewed to the Board, and finally denied by the Board in its decision of September 2, 1957. At that time substantial additional information was available, not only in the area of costs but also in the area of traffic volumes and effect of jet transportation upon traffic growth. In denying United a right to present this evidence, vital as it undeniably was to a proper determination of the issues presented by this case, the Board deprived United of a fair hearing.

It will no doubt be urged that there must always be an end to the taking of testimony, but equally must it be remembered that prior to the time of decision, a court or agency always has it within its power to accept newly discovered evidence. Particularly is this true of an administhat it presented none of the involved problems found in the ordinary route case. There was no question as to whether American should be permitted to provide an uneconomic San Francisco-New York nonstop service in order to provide service that would otherwise be denied to passengers on other portions of its system. This is the situation in the ordinary route case where the certificate sought relates to only a segment of the service which the certificate is intended to provide. This is the explanation for the grant of a large majority of the certificates to which American and San Francisco have heretofore referred in brief and on argument.

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Even before the Examiner issued his initial decision, however, major upward changes became apparent in the anticipated pattern of costs. In particular, American had added a third pilot to its flight crew and a fourth stewardess. United called these publicly known facts to the attention of the Examiner and asked that the hearing be reopened in order to consider what effect they would have on American's cost estimates. The motion was denied, renewed to the Board, and finally denied by the Board in its decision of September 2, 1957. At that time substantial additional information was available, not only in the area of costs but also in the area of traffic volumes and effect of jet transportation upon traffic growth. In denying United a right to present this evidence, vital as it undeniably was to a proper determination of the issues presented by this case, the Board deprived United of a fair hearing.

It will no doubt be urged that there must always be an end to the taking of testimony, but equally must it be remembered that prior to the time of decision, a court or agency always has it within its power to accept newly discovered evidence. Particularly is this true of an administrative agency, where it is customary to update evidence which was valid at the time of its receipt but no longer representative of the facts at the time of agency decision. In the instant proceeding it was stipulated, for example, in line with ordinary hearing procedures, that there be incorporated into and considered a part of the record such material as Forms 41 and the Official Airline Guide for each month prior to the final decision of the Board. Certainly the evidence which United called to the attention of the Board was more significant than any information contained in the Forms 41, and refusal of the Board to accept it was an abuse of its discretion.

Petitioner in its Statement of the Case and Summary of Argument has already called attention to the refusal of the Board to grant petitioner adequate time on oral argument to make a fair or even intelligible presentation of its position, to the preferential treatment in that respect accorded to the proponents of additional service, and to the significance of the failure of members of the Board majority to explain their departure in this proceeding from views expressed by them in no uncertain terms in other recent route cases. These actions were also highly prejudicial to the interests of United and served to deprive it of a fair hearing.

THE FINDINGS AND ORDER OF THE BOARD

Petitioner recognizes and accepts the fact that the Board possesses broad discretionary powers in determining the public convenience and necessity, but the powers of the Board are not unlimited. They must be exercised within the bounds prescribed by the Federal Aviation Act and the Administrative Procedure Act.

No certificates shall authorize an air carrier to engage in any air transportation "unless such transportation is required by the public convenience and necessity." (49 U.S.C. 1371, 72 Stat. 755)

Competition is in the public interest only to the extent necessary to assure the sound development of an air transportation system. (49 U.S.C. 1302, 72 Stat. 740)

It is in the public interest to foster sound economic conditions in such transportation and to promote economic and efficient service by air carriers at reasonable charges. (49 U.S.C. 1302, 72 Stat. 740)

Every order of the Board shall set forth the findings of fact upon which it is based. (49 U.S.C. 1485(f), 72 Stat. 795)

The decision of this Court in the case of *Clarke* v. *United States,* 101 F. Supp. 587 (D.C. D.C., 1951), has gone far in putting flesh upon these statutory bones. Plaintiffs in that case operated a bus service from Lexington Park, Maryland to Washington via a short-cut route; Greyhound operated a bus service between the same two cities over a longer route. The Interstate Commerce Commission granted Greyhound a certificate for operation over the plaintiffs' route, without permitting the pick-up or discharge of passengers on the short-cut portion of that route, and plaintiffs sought to enjoin the Commission's order.

Particularly pertinent to the decision here are the following excerpts from the Court's opinion:

> "Discussion of the controversy should proceed from certain basic principles of public utility regulatory law. *The first such principle is that, if there be traffic enough for only one carrier, only one carrier will be certificated.* The public interest in that situation is for service. *Only if there be traffic enough to support efficient operations by more than one carrier does the public interest require the competitive operations of two*

carriers. In Texas & P. Ry. Co. v. Gulf, Etc., Ry., the Supreme Court said that in the Transportation Act of 1920 Congress 'recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; *that the property employed must be permitted to earn a reasonable return;* that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss.'

"The foregoing principle appears in various forms in different cases. It is sometimes said that a certificate for a new service will not be granted unless a public need for the service appears. In other cases it is said that where there is an outstanding certificate for a service another certificate will not be granted unless it is shown that the existing service is inadequate. This principle, if applicable to the present controversy, would mean that, unless there is a public need for another service, or unless the service being rendered by Atwood is inadequate, another certificate to another carrier for service between Lexington Park and Washington should not be granted. If the traffic between those points is enough to preserve the financial stability of only one carrier, the presence of two carriers and the competition between them would inevitably result in the deterioration of service to the injury of the public.

* * *

"The Commission is the final arbiter of the public interest, and the function of a reviewing court is limited. At the same time, as the Supreme Court said in Interstate Commerce Commission v. Parker, the ultimate finding of public convenience and necessity must be based upon the proper statutory criteria and must have had the necessary factual findings to sup-

> port it. . . . As the Supreme Court has said many times, we cannot exercise even our limited power of review unless the findings of fact are adequate to indicate that the Commission did consider these criteria which the law requires.
>
> "In the record before us there are repeated references which indicate that there is not enough traffic over the routes here involved to *maintain efficiently* two carriers. *But the Commission made no finding one way or the other on that point. . . .*"
>
> (101 F. Supp. at 590-94, emphasis added)

Within the past five weeks, this Court has indicated the application of these same general principles of public utility regulation to the air transport industry. In *Delta Air Lines, Inc., et al.* v. *Civil Aeronautics Board,* Case No. 14798, ... F. 2d ...., this Court said:

> "Another general doctrine, based upon economic considerations, is pertinent to the present case. In many fields, including both communications and air transportation, an operating license requires a preliminary finding of public interest, convenience and necessity. The public interest requires service for the public. It therefore requires that, if there be only enough business to support operation by one licensee, there must be only one licensee. This is a commonplace of public utility regulation. We discussed the principle at length in *Carroll Broadcasting Co.* v. *Federal Communications Comm'n.*" (Opinion, p. 9)

To the same general effect are *American Trucking Associations, Inc.* v. *United States,* 326 U.S. 77 (1945), and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U.S. 266 (1926).

In the orders which the Board has issued in this proceeding it has clearly exceeded its statutory authority. It has neither made those findings of fact which would be necessary to support its ultimate finding or conclusion of public convenience and necessity, nor is there substantial evidence in the record which would support such findings had they been made.

On the issue of adequacy of service, the facts which should have been determinative of the Board's decision are clear and not questioned by any finding. United and TWA were conceded to be providing a substantial number of nonstop schedules, both coach and first class, at the time of the hearing. It was likewise conceded that they proposed to provide a substantial amount of jet service with frequencies the same as or in greater number than those proposed by American, and with jet planes with either identical or comparable operating characteristics. There was no finding that the service being provided or proposed by United or TWA was not fully adequate to meet the needs of the market.

The Board did state that while past service by United and TWA was legally adequate, it was difficult for a traveler to obtain his choice of schedule or departure time, particularly on nonstop coach flights, during a limited period in early 1957. The reasons for the temporary shortage of long range equipment experienced by both United and TWA have been set forth in petitioner's Statement of the Case and are not in dispute. They have been ignored, as have the other facts which serve to contradict even this limited finding. In January and March, 1957 United's and TWA's San Francisco-New York first class nonstop flights operated at an average load factor of approximately 69% (Tr. 3570, 3602, 3605), and San Francisco's principal witness testified that "almost all of the time you could get first class reservations." (Tr. 1062) That is not, however, the most important point to be made. The minority has stated more forcibly than could petitioner the arbitrary and capricious nature of the action of the Board in predicating convenience and necessity upon a temporary equipment shortage:

> ". . . Never before has this Board found service to be inadequate on so slim a reed as the experience during a four or five month period in one year where service has admittedly been adequate both before and after. . . . Clearly such over-emphasis on the ability of carriers to meet short run traffic demands in an industry where lead time on new equipment can be up to five years, is unsound, and if this policy is to be followed in future route cases, it will encourage premature and uneconomic equipment decisions." (Tr. 4766)

If there was a need for more service in the San Francisco-New York market, a need established neither by the evidence nor findings of the Board, there remained upon the Board the obligation to consider the question of what effect such added service would have upon United and TWA and to make findings which would support whatever conclusions it reached. Nothing is more indicative of the total inadequacy of the Board's opinion than the void which appears in the place of these findings.

The Board skirts the explosive issue of the effect of its order with no more than meaningless statements and conjectures. It assumes that there should be 1,000 passengers per day available for support of the San Francisco-New York nonstop market in 1960. But the size of the market to be served is no more than the beginning of the inquiry which the Board was required to undertake. If there were 1,000 passengers a day available for support of this market, it does not automatically follow that the market or the public interest would be best served by the duplicating service of a third carrier, or that the services of three carriers could be economically, efficiently or profitably maintained. What would be the effect upon United and TWA of the drastically reduced load factors which would be the admitted result of the Board's decision? The Board concedes that there would be diversion of over six million dollars a year in revenues from United and only a slightly smaller sum from TWA, but leaves this finding hanging in mid-air with no effort to evaluate its significance. Would there or would there not be offsetting savings in costs, and if so, what would be the extent of these savings? How would total system net revenues be affected by the loss of revenues in the San Francisco-New York market? What would be the effect of this loss upon the service to be provided to the public by United, either in the San Francisco-New York market or systemwide? What rate of return, if any, would United or TWA earn on its investment in the San Francisco-New York market?

Findings on issues such as these were required for the support of an informed and valid decision. They are nowhere to be found, though their absence cannot be explained because of any lack of evidence for the Board to consider. Witnesses for United testified that the New York-San Francisco market should provide a net profit in 1960 of $1,167,000 for United and TWA in the absence of provision of duplicating service by American. They further testified that the additional service proposed to be provided by American might be expected to transfer this profit into a net loss of $5,451,000, with American participating in that loss, and that losses for the three carriers would continue at least into 1965.

Petitioner does not suggest that the Board was required to accept this evidence as conclusive of the issues to which it was directed. Petitioner does urge that if it did provide a reliable appraisal of what the effect of added service would be, the Board had no alternative other than to deny American's application. Petitioner further urges that if the Board was unwilling to accept this evidence as a reliable indication of what would be the effect of the granting of American's application, it was at the very least required to make specific and definite findings on the issues to which it was related. The vague conclusion that for reasons which the Board was unable or unwilling to state, the three carriers should be able to operate at above break-even load factors, assuming a reduction of the frequencies stated by the carriers to be necessary in order to provide adequate service for the market, will not serve as a substitute for findings covering the actual anticipated effect upon United of the proposed added service, the return on investment that would be provided thereafter or the effect of the loss of San Francisco-New York nonstop revenues upon United's operations and its ability to provide service both in the San Francisco-New York market and systemwide.

THE TRUE PUBLIC INTEREST AT ISSUE

The Board has chosen to not consider that public interest, which should have been of primary concern to it, the interest of all users of air transportation in the maintenance of an air transportation system providing economical and efficient service at reasonable charges. The Board does not pretend that provision of duplicating service by these carriers in the San Francisco-New York market would be either economical or efficient. It has not challenged the statement by the minority that the probable result of the majority's decision would be to increase general passenger fare levels. In their dissenting opinion, Chairman Durfee and Member Denny said:

> "Additionally, and most important, the majority fails to discuss the possible effect that diversion, in the

> amount of $12,000,000, will have upon passenger fares. The Board, in the *General Passenger Fare Investigation,* Docket 8008, must determine whether there should be an increase in fares over the level in existence on February 9, 1958. If the evidence in that case indicates that fares should be increased, the amount of the increase will depend upon the earning prospects of the industry. If a third nonstop carrier is authorized between New York and San Francisco, industry profits will be reduced by up to $12,000,000, and this reduction will be compensated in the form of increased fare levels for which the public gets little or nothing in return." (Tr. 4781)

Messrs. Durfee and Denny might have added that the total invested capital of American, TWA and United represents more than 50% of that of the entire domestic airline industry, and that the passenger fare levels required to maintain an adequate rate of return for those carriers are of corresponding importance in determining what fare levels for the entire industry must be.

There can be no conceivable justification for finding that the public convenience and necessity calls for third carrier service, which would do no more than satisfy the pride of a great city at the expense, in the form of a probable increase in passenger fare levels, of all users of domestic trunk line air transportation.

CONCLUSION

For the reasons set forth herein, petitioner prays that the orders under review and any certificate of public convenience and necessity issued to American Airlines, Inc. pursuant thereto be set aside; and that the Court grant to petitioner such other and further relief as the Court may deem proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing brief to be served on all parties to this proceeding by causing a copy thereof to be mailed, postage prepaid, to each of the following:

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Dated at Chicago, Illinois, this 15th day of January, 1960.

/s/ H. Templeton Brown
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APPENDIX A

The pertinent provisions of the Federal Aviation Act are as follows:

Section 102 (49 U.S.C. 1302, 72 Stat. 740):

"In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

* * *

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."

Section 401 (a-d)(1) (49 U.S.C. 1371, 72 Stat. 754-5):

"(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

Section 1001 (49 U.S.C. 1481, 72 Stat. 788):

"The Board and the Administrator, subject to the provisions of this Act and the Administrative Procedure Act, may conduct their proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice."

Section 1004(a) (49 U.S.C. 1484, 72 Stat. 792):

". . . In all cases heard by an examiner or a single member the Board shall hear or receive argument on request of either party."

Section 1005(f) (49 U.S.C. 1485(f), 72 Stat. 795):

"Every order of the Administrator or the Board shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order."

The pertinent provisions of the Administrative Procedure Act are as follows:

Section 10(e) (5 U.S.C. 1009(e), 60 Stat. 243):

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The pertinent provisions of the Principles of Practice and the Rules of Practice of the Civil Aeronautics Board are as follows:

Section 300.2(a), (c) (14 C.F.R. §300.2(a)):

> "Hearing cases; improper influence. It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases:
>
> > (a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in

> the case by any person, either in private or public life, unless provided for by law."
>
> * * *
>
> (c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case."

Rule 14 (14 C.F.R. §302.14):

"Participation in hearings by persons not parties. Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned."

Rule 24(j) (14 C.F.R. §302.24(j)):

"Receipt of documents after hearing. No document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the Examiner."

BRIEF OF PETITIONER UNITED AIR LINES, INC.

In The

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15414

UNITED AIR LINES, INC.,
Petitioner,
v.
CIVIL AERONAUTICS BOARD,
Respondent,
AMERICAN AIRLINES, INC., CITY AND
COUNTY OF SAN FRANCISCO,
Intervenors.

On Report of the Civil Aeronautics Board
Following Remand

United States Court of Appeals
for the District of Columbia Circuit
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I.

STATEMENT OF QUESTIONS PRESENTED

1. Whether *ex parte* attempts by American Airlines and the City and County of San Francisco, directly and indirectly, to influence the decision of the Civil Aeronautics Board in violation of its Principles of Practice deprived petitioner of due process of law and a fair hearing as guaranteed by the Administrative Procedure Act and the Federal Aviation Act.

2. Whether the Civil Aeronautics Board in its "Opinion on Remand" erred in concluding that the violations of its Principles of Practice found to have been committed by American Airlines and the City and County of San Francisco during the course of the proceeding under review did not vitiate that proceeding and require a setting aside of the award of an airline route to American Airlines in that case.

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IN THE

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AMERICAN AIRLINES, INC., CITY AND
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On Report of the Civil Aeronautics Board Following Remand

JURISDICTIONAL STATEMENT

This proceeding is before the Court at this time for the purpose of reviewing an "Opinion on Remand" issued by the Civil Aeronautics Board pursuant to the Court's order of May 19, 1960.

Originally the case came before the Court on separate petitions of United Air Lines, Inc. and Trans World Airlines, Inc. to review orders of the Board granting a certificate of public convenience and necessity to American Airlines, Inc. to operate nonstop air service between New York and San Francisco. Those petitions challenged the validity of the Board's orders on various grounds, including alleged *ex parte* efforts by American and the City and County of San Francisco to influence the Board's decision which petitioners maintained violated the Board's Principles of Practice, vitiated the proceeding below and required a setting aside of the New York-San Francisco nonstop award to American.

The Court, by opinion of May 19, 1960, upheld the Board except with respect to the question of violations of its rules and the consequences of such violations if they were found to have occurred. It was as to those matters that the case was remanded to the Board for further hearings with directions to the Board to transmit to the Court a certified transcript of those hearings together with the Board's findings and conclusions thereon.

The Court's jurisdiction over the proceeding, which had been invoked by the original petitions for review, was specifically retained by its order of remand.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. §1486, the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. §1009, and the Board's Principles of Practice, the pertinent provisions of which are set forth in Appendix A, *infra.*

STATEMENT OF THE CASE

While a fair reading of the evidentiary transcript on remand discloses improper activities on the part of American and San Francisco over and above those found by the Examiner and the Board, the findings that have been made amply substantiate the allegations made in United's Petitions for Review and clearly establish that both American and San Francisco intentionally embarked upon a campaign aimed at applying such *ex parte* pressures to the Board as would influence its decisions in this case. United, therefore, is willing to rest upon the findings which have been made, and the ensuing statement of the case is confined to matters reflected in those findings.

1. Prior to the issuance by the Board of the orders under review, United and TWA were the only air carriers authorized to provide nonstop service between New York and San Francisco. American was required to make a minimum of one stop on flights between those points (Tr. 10326-27).

In 1953, American filed an application with the Board to remove this one-stop restriction on its New York-San Francisco service (Tr. 10317). In February 1957, it decided to press for a hearing on that application (Tr. 10332). Shortly thereafter, Messrs. Shipley and Strickler, then Assistant Vice President and Assistant to the Vice President, respectively, of American were sent to San Francisco to ask the City to initiate action on the carrier's application (Tr. 10329, 10332-33).* The City refused, but readily agreed to support any steps that American might take to that end (Tr. 10335, 10336).

---

* This trip was followed by three additional trips to San Francisco in 1957 and three in 1958 on the part of Shipley. Strickler made eleven trips to San Francisco in 1957, twelve in 1958 and eight in 1959. A substantial part of the activities of both Shipley and Strickler on these occasions related to American's nonstop application (Tr. 10334-35).

American accordingly, on May 3, 1957, filed its own motion with the Board requesting expeditious hearing on its nonstop application (Tr. 10336). San Francisco, through its Public Utilities Commission, supported American by answer filed on May 13, 1957 (Tr. 10338). The filing of that answer was authorized by a Commission resolution adopted on May 7, 1957, which in addition directed that copies thereof be furnished to California Senators and Congressmen and that those officials be requested to support San Francisco in urging the Board to set American's application for an early hearing (Tr. 10337). The precise form of the resolution was known to at least one American employee prior to the date of its adoption (Tr. 10341).

2. Between the filing of American's motion and the Board's initial denial thereof on June 26, 1957, the Board received seventy-seven separate significant communications from the Mayor of San Francisco, members of Congress, state and city officials, chambers of commerce, other community organizations and several private citizens. Most of these communications urged not only an early hearing on American's application but also the certification of a third New York-San Francisco nonstop carrier. American had access to and knowledge of these communications. However, to use the Examiner's language, "few" were served on United or TWA (Tr. 10362, 10363).

This groundswell of interest in the case was not accidental. American's Washington representative promptly informed the Washington offices of various California and New York Congressmen of the filing of the carrier's motion (Tr. 10340). In almost all instances, these Congressmen wrote to the Board supporting American's request for an early hearing (Tr. 10341). Meanwhile, in San Francisco and pursuant to instructions from Strickler, American's sales personnel visited Bay area chambers of commerce urging them to adopt resolutions endorsing American's motion and to transmit copies of the same to the Board and interested members of Congress. A number of such resolutions were adopted and received by the Board (Tr. 10345, 10346). For similar purposes, American's salesmen contacted travel agents in both the San Francisco and New York areas. Some of these agents were specifically asked to write to their Congressmen. Some sent letters directly to the Board, others wrote to Congressmen who, in turn, forwarded such communications to the Board. A number of these communications were also directed to the merits of the nonstop question (Tr. 10349-52). Additionally, American employees maintained regular contact with San Francisco newspapers and inspired many news stories and editorials vociferously favoring a third nonstop carrier. These newspaper articles came to the attention of Members of the Board both through the Board's clipping service and through *ex parte* letters from the Mayor of San Francisco who cited them as support for the Ctiy's endeavor to obtain additional nonstop service to New York (Tr. 10347, 10359-60, 10447).

Besides sending letters to the Board (Tr. 10344-45, 10361, 10294), the Mayor of San Francisco contacted California Congressmen seeking their cooperation and assistance in obtaining an early hearing in the nonstop case (Tr. 10342). Congressmen so contacted wrote to the Board likewise urging an early hearing (Tr. 10446). Resolutions to similar effect were received by the Board from the Boards of Supervisors of northern California counties, following solicitation therefor by the Mayor's office. Working in unison with San Francisco officials, American representatives were fully aware of these activities on the part of the City (Tr. 10362, 10446).

3. Although American's motion for expedition was denied by order of June 26, 1957, the Board at the same time directed its staff to review New York-San Francisco air service and report the results of its study to the Board on or about December 1, 1957 (Tr. 10318). Such a report was made and on January 13, 1958, the Board reversed its prior order and directed an expedited hearing in the nonstop case (Tr. 10318, 10319).

The application of political pressure had been continued without abatement during the period intervening between the dates of these two orders. Besides contacts by Shipley with members of Congress and besides sixteen *ex parte* communications* received by the Board during this period from Congressmen, other officials and community organizations urging early consideration of the nonstop case, still other measures were resorted to (Tr. 10363-64, 10386-87, 10448-49).

A month before the Board's staff report was due, a luncheon meeting attended by businessmen, city officials and members of the press was held in San Francisco on November 4, 1957, pursuant to instructions from the president of American Airlines. During the course of this meeting, American's president urged San Francisco to continue its efforts for an early hearing, stating that "you have to keep hammering * * * if you want to get anywhere" (Tr. 10368-69).

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* With few exceptions, these communications were in response to previous communications received by these officials and organizations from American or San Francisco (Tr. 10365, 10448). Among them was a letter from the Chairman of the San Francisco Mayor's Committee to Mr. Sherman Adams requesting assistance in obtaining an expedited hearing and enclosing a "Condensed Facts Sheet" that had been previously prepared by Strickler and the Deputy City Attorney. These particular communications were forwarded by Adams to the Board (Tr. 10365-66).

A few weeks later, San Francisco officials, being of the opinion that "the Board would have to be 'pressured,'" sent a lobbyist to Washington to discuss with California Congressmen the City's interest in an early hearing in the case (Tr. 10370-71, 10448). This endeavor bore fruit. Certain members of Congress from California arranged a conference between representatives of San Francisco and the Board for December 2, 1957 (Tr. 10370). The conference was held on that date without any other persons or carriers interested in the nonstop case being invited or being present (Tr. 10370). Its purpose was to provide a means whereby San Francisco might try to convince the Board of the City's alleged need for a third nonstop carrier to New York (Tr. 10290).

American shares responsibility with San Francisco for the impropriety of this *ex parte* conference. Strickler had briefed the lobbyist on the nonstop case before the latter went to Washington (Tr. 10371). Indeed, American suggested the conference in the first instance and supported San Francisco throughout that activity (Tr. 10290). Shipley and Strickler met with the San Francisco representatives immediately after the conference and American's Senior Vice President complimented them on their presentation to the Board (Tr. 10372, 10373). Both American and San Francisco attributed the ultimate setting the case for hearing in no small measure to this effort (Tr. 10290).

4. Following the Board's January 13, 1958, order of expedition, the case came to hearing in July and September 1958; an Examiner's initial decision was issued on March 9, 1959, recommending the grant of American's application; oral argument was heard before the Board on April 29,

1959; and the Board's decision was issued on September 2, 1959 awarding American New York-San Francisco nonstop authority (Tr. 10319-20).

During the fifteen month period intervening between the Board's order of expedition and oral argument, at least fifteen significant *ex parte* written communications were sent to the Board from the Mayor of San Francisco and members of Congress urging the early certification of a third New York-San Francisco nonstop carrier (Tr. 10376-77, 10390, 10391).[*]

Some of these communications were attributable to another luncheon given by American for city officials, newspapermen and others in San Francisco on June 16, 1958 (Tr. 10380). This was the day on which the Examiner announced a three week postponement of the hearing (Tr. 10375). Indignation over the Examiner's action ran high at the luncheon (Tr. 10380). On June 23, 1958, the Mayor dispatched an *ex parte* telegram to the Board complaining about the delay and urging expedition so that San Francisco might have jet service in 1958 (Tr. 10376, 10295-99). On the same date, editorials appeared in the San Francisco newspapers highly critical of the Board (Tr. 10381). Copies of the Mayor's telegram and of these editorials were sent to Members of the California Congressional delegation who forwarded them to the Board with, in at least one instance, expressions of dissatisfaction over the Board's handling of the case (Tr. 10376, 10381). According to an American employee, the editorials that had thus reached the Board were a direct consequence of discussions occurring at the above mentioned luncheon (Tr. 10292).

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[*] The communications referred to in the text do not include letters from Congressmen to the Board relating to purely formal matters or submitting written statements in lieu of oral argument. United has never objected to communications of that character even though in at least one instance a statement in lieu of argument had been composed by a representative of American (Tr. 10388).

In January 1959, when the Examiner's initial decision was not forthcoming as early as hoped, the Mayor of San Francisco again sent letters to members of the California Congressional delegation. These letters generated additional communications from Congressmen to the Board, some of which were accompanied by copies of the Mayor's letter (Tr. 10376, 10398, 10451).

Moreover, American remained in almost constant contact with San Francisco newspapers during this period and, as shown, was responsible for the above mentioned editorials attacking the Board (Tr. 10377, 10378, 10452). Shipley and Taylor continued their contacts with Congressmen, informing them of the progress of the case and, when requested, offered suggestions as to what the Congressmen might do (Tr. 10386, 10413). Further, in March and April 1959, and upon instructions from their superiors, American's sales personnel in the New York area asked travel agents and other large users of American's service to write to their Congressmen expressing interest in the nonstop case (Tr. 10387, 10388). Communications so received from travel agents (and which urged Congressional support for American's application) were forwarded by the Congressmen to the Board (Tr. 10352, 10377, 10390-91, 10288).

5. On the basis of the foregoing and other findings appearing in the Examiner's initial decision and the Board's opinion, the Board found that American had violated Rule 2(c) of its Principles of Practice by soliciting, inspiring or authoring *ex parte* communications to the Board from Congressmen, civil officials and travel agents designed to educe favorable action on American's motion for an expedited hearing; by soliciting certain travel agents and "at least

one" Congressman after the close of the hearing to support its application by means other than formal participation in the case; and by attempting, both before and after hearing, to bring off-the-record pressures on the Board through a publicity campaign in the daily press of the San Francisco Bay area (Tr. 10288-91).

San Francisco was found to have violated both Rule 2(a) and 2(c) of the Principles of Practice by transmitting *ex parte* communications of its own to the Board, by bringing American's motion for expedition to the attention of Congressmen, and by inspiring *ex parte* communications by others—all with the intent of swaying the Board's judgment (Tr. 10294).

Further, the Board found that American and San Francisco jointly violated Rule 2(c) by arranging and attempting improperly to utilize the *ex parte* conference between representatives of San Francisco and the Board held on December 2, 1957, as a means of discussing the merits of the nonstop question with the Board (Tr. 10289-90, 10294).

6. Notwithstanding its findings of numerous off-the-record activities and specific violations of its Principles of Practice by both American and San Francisco, the Board concluded that nothing would be done about them (Tr. 10309-10). In order to reach that result, the Board, of necessity, was obliged to characterize those violations as neither substantial nor prejudicial (Tr. 10298). Adhering to its earlier opinion previously reviewed by this Court (Tr. 5435), the Board maintained that the proceeding below had not been vitiated since there were no allegations or evidence of venality, no personal misconduct by any member of the Board, no conscious bias, no wrongdoing on the part of third parties, no covert approaches to the Board, its staff or Examiner and no corrupt tampering with the

adjudicatory process (Tr. 10302). The question of prejudice and denial of due process to United and TWA was disposed of by the Board's adherence to its prior rejection of suggestions "that the activities here in question might conceivably have had some effect upon a Member [of the Board] in arriving at his decision" (Tr. 10303). Recision of the award to American as a means of vindicating the Board's processes was dismissed because the violations found to have occurred, although admittedly purposeful, were supposedly not intentional in view of alleged ambiguities in the Board's rules and, therefore, according to the Board, amendment of its rules, rather than insistence upon compliance therewith, was the vehicle for deterring future violations (Tr. 10306). Finally, for similar reasons and because it would grant the nonstop route to American despite its violations, the Board rejected suggestions by the Department of Justice that the award to American be rescinded and that carrier's qualifications reevaluated with those of another applicant in the case (Tr. 10307).

SUMMARY OF POINTS

The Board, after finding that American and San Francisco had attempted to bring *ex parte* pressure to bear upon the Board in violation of its Principles of Practice, erred in—

1. Failing also to find that said *ex parte* activities by American and San Francisco vitiated the proceeding below and deprived United of due process of law and a fair hearing.

2. Refusing, because of such vitiation and denial of a fair hearing, to set aside the certificate of public convenience and necessity awarded to American below and direct a hearing *de novo* in the case.

SUMMARY OF ARGUMENT

The record is now perfectly clear that American and San Francisco deliberately embarked upon a campaign to bring off-the-record pressures to bear upon the Board, that those pressures were designed to influence the Board's decisions, and that those activities violated the Board's Principles of Practice. The campaign of pressure was directed first to obtaining an early hearing on American's application and secondly to obtaining a favorable decision on that application. Whether American's and San Francisco's improper activities actually influenced the Board is of no moment. The inescapable and significant facts are that improper efforts were made to influence the Board and the intended results were achieved.

The question before the Court now is what action should be taken. In United's opinion the proper course is to set aside the award to American and direct an entirely new hearing encompassing both the question whether the public convenience and necessity require a third New York-San Francisco nonstop carrier and the further question of the applicant to provide the service if it is found to be required.

This course is abundantly supported by recent decisions of this Court. *WKAT, Inc.* v. *FCC,* ... U.S. App. D.C. ..., 296 F.2d 375 (1961); *Massachusetts Bay Telecasters* v. *FCC,* ... U.S. App. D.C. ..., 295 F.2d 131 (1961); *Sangamon Valley Television Corp.* v. *United States,* ... U.S App. D.C. ..., 294 F.2d 742 (1961). In those cases this Court insisted that the public interest in the adjudicatory processes of government is paramount and that parties before administrative agencies resorting to *ex parte* efforts to influence agency decisions are fortunate if they lose no more than the matter in issue. Adhering to those principles, the Court in the cases cited not only sustained agency decisions setting aside awards and ordering new hearings in proceedings in which *ex parte* pressures had been employed, but it went further and reversed an agency for failing to take such action in a proceeding tainted with such activities, holding that a fresh start was necessary.

There are no mitigating circumstances which justify anything less than a recision of the award to American and a new hearing before the Board. The absence of such matters as venality and corruption does not purge the proceeding below of the taint of *ex parte* pressures as the Board appears to imply. The finding that members of the Board were not influenced by the improper activities of American and San Francisco leaves unanswered the unresolvable question of unconscious influence and overlooks the prejudice to United by being compelled, because of the Board's order of expedition, to go to hearing on American's application before economic data respecting newly introduced jet aircraft could be ascertained from operating experience. Assertions of alleged ambiguities in the Board's Principles of Practice ignore the fact that those rules do no more than restate canons of judicial ethics as well as the even more important fact that American's and San Francisco's improper activities would never be tolerated before a Court. The argument that more violations of the Board's Principles of Practice occurred when the case was being activated than after it was set for hearing ignores both the importance to American of obtaining an expedited hearing and the continuity of the campaign of pressure throughout the case. The Board's further statement that the proceeding below was a licensing and not an enforcement case has little relevance. The paramount public interest here, in the language of the Court, is the integrity of the adjudicatory processes.

Finally, recision of the award to American will not adversely affect the public traveling between New York and San Francisco. Evidence which United requests leave to submit to the Court demonstrates that, aside from the ability of United and TWA to add flights if required, the unused seats on their New York-San Francisco nonstop flights are substantially more than ample to accommodate all passengers using American's nonstop service between those cities.

United, therefore, maintains that the improper off-the-record activities of American and San Francisco deprived United of a fair hearing, vitiated the proceeding below, and require vacation of the award to American and a fresh start in the form of a hearing *de novo* before the Board.

ARGUMENT

For the purpose of the single argument which United desires to make, it is sufficient to state, without any detailed analysis of the record, that American and San Francisco deliberately sought to influence the decisions of the Board through an organized and continuing effort to apply off-the-record pressure, political and otherwise. These activities have been found by the Board to have been in violation of its Principles of Practice. They were intended, first, to secure an expedited hearing of American's application and later a favorable decision upon that application. Both ends were narrowly achieved, in each instance by a three to two decision. What part the improper conduct of American and San Francisco played in accomplishing these results no one can with certainty say, and need not with certainty say. It is enough that the effort was made and the intended results achieved.

The issue, as United sees it, is not whether this Court should act, but merely what action this Court should take. To be considered in arriving at a conclusion are: (1) the nature and potential effect of the offenses committed; (2) the interest of the Court, the Board, and the public in maintaining the integrity of the Board's processes; (3) the right of all parties to the proceeding to due process, to a decision uninfluenced by outside pressures; and (4) the effect that an order of the Court would have upon that part of the traveling public which is concerned with the quantity and quality of New York-San Francisco nonstop service.

United submits that on all counts the proper course is to set aside the award to American and direct an entirely new hearing encompassing both the question whether the public convenience and necessity require a third New York-San Francisco nonstop carrier and, in the event of an affirmative finding on that inquiry, the further question as to what carrier should be selected to provide that service. In United's opinion any action short of that would completely fail to protect the interest of those parties concerned with or affected by the improper activities engaged in by American and San Francisco.

To do as the Board has done and decline to set aside the grant to American would have the practical effect of providing a reward to that carrier for having successfully violated the Board's Principles of Practice. It would undermine rather than support the integrity of the adjudicatory process. And the action suggested by United would not, as will be subsequently shown, prevent New York-San Francisco nonstop passengers from being adequately served while awaiting a Board decision based upon those facts upon which a decision should be based, facts which are now a matter of knowledge rather than sheer conjecture.

I.

RECISION OF THE AWARD TO AMERICAN IS SUPPORTED BY JUDICIAL PRECEDENTS OF THIS COURT.

This Court in recent decisions has made it abundantly clear that parties to adjudicatory proceedings before an administrative agency who are not content to rest their case on the evidentiary record but resort to *ex parte* efforts to influence the agency's decision are fortunate if they lose no more than the matter involved in the proceeding. In *WKAT, Inc.* v. *F.C.C.,* ... U.S. App. D.C. ..., 296 F.2d 375 (1961), this Court sustained an order of the Federal Communications Commission disqualifying applicants for a television license who, according to the Commission, were not satisfied to be judged upon the record made in open hearings but sought to influence the results by factors un-related to the merits and not a part of the formal record. In doing so, this Court said (296 F.2d at 383):

> "In Root Refining Co. v. Universal Oil Products Co., Circuit Judge Morris A. Soper wrote:
>
> > 'The client who with evil intent employs such an agent [i.e., one who attempts by personal influence to control a judge or jury or who holds himself out as able to do so] fares no better in the instant case. To him also the doors of the courts are closed. From the moment that he ceases to depend upon the justice of his case and seeks discriminatory and favored treatment, he becomes a corrupter of the Government itself and is fortunate [sic] if he loses no more than the rights he seeks to obtain.'
>
> "This doctrine applies to the adjudicatory functions of an administrative agency. This is not a mere technicality. Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding."

In fact, the Court went even further and rejected arguments that offenses against the administrative process were to be weighed with, and might be counterbalanced by, consideration of public convenience and necessity, stating (296 F.2d at 383):

> "We do not have here an ordinary case of 'unclean hands', in which counterbalancing considerations of public interest in the service involved might justify awards despite misbehavior. This case concerns corrupt tampering with the adjudicatory process itself.

> No public interest in service or capacity for service is paramount to the public interest in the integrity of the adjudicatory processes of government, the Commission concluded. The order proposed to be adopted by the Commission is well within its authority, the breadth of which is well illustrated by the order approved in Massachusetts Bay Telecasters, et al. v. Federal Communications Comm'n."*

Even more pertinent is this Court's decision in *Sangamon Valley Television Corp.* v. *United States,* ... U. S. App. D. C. ..., 294 F.2d 742 (1961). While the *WKAT* case promulgated the legal principles applicable to situations involving extra-record efforts to influence adjudicatory decisions of administrative agencies, the *Sangamon* case demonstrates this Court's insistence upon scrupulous adherence to those principles. In that case, the Federal Communications Commission, after remand, found that while the successful applicant for a television channel had made *ex parte* approaches to its members, the applicant's conduct was not absolutely disqualifying and therefore proposed to permit comments by opposing parties on matters submitted in the *ex parte* presentations that had been made. This Court was not satisfied. It held that the Commission's action was not enough. It sent the case back with instructions to conduct an entirely new proceeding. The Court said (294 F.2d at 743):

> "The Department of Justice * * * contends on behalf of the United States 'that the "basic fairness [which]

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* The case cited by the Court, *Massachusetts Bay Telecasters* v. *F.C.C.,* ... U. S. App. D. C. ...., 295 F.2d 131 (1961), upheld an order of the Commission finding that while attempts had been made to influence members of the Commission, no actual influence had occurred, no applicant and no member of the Commission was disqualified; but that the nondisqualifying conduct of the successful applicant nonetheless justified setting aside of the award of a television license to it.

> requires that such a proceeding . . . be carried on in the open" can only be achieved by starting afresh.' In all the circumstances, we think a fresh start is necessary. The Commission's former order was issued over four years ago. Three of its then members have been succeeded by others. In all the circumstances we think it would not be appropriate for the Commission to determine in 1961 on the basis of a somewhat supplemented 1957 record where and to whom VHF Channel 2 ought to be assigned. We remand the case to the Commission with instructions to conduct an entirely new proceeding. . . ."

The considerations prompting the Court to order a new proceeding there are equally applicable here. The factual situations in both instances are similar. In the *Sangamon* case the Commission found that *ex parte* approaches had been made to it. Here the Board found that both American and San Francisco had violated its Principles of Practice by *ex parte* efforts to influence its decision. In the *Sangaman* case, the Commission order making the contested award was approximately four years old. Here the Board's order awarding nonstop rights to American was based on a record 3½ years old and the order itself was entered more than 2½ years ago. In the *Sangamon* case three members of the Commission participating in the original decision had been succeeded by new members. Here, likewise, three members of the Board taking part in the original decision below have been succeeded by new members (Cf. Tr. 4730, 4756-57 and Tr. 10310). Moreover, here the Board's original decision was reached by a three to two vote, one member of the majority and both members of the minority being no longer with the Board. The combination of all these facts require a fresh start here just as they did in the *Sangamon* case.

II.

THERE ARE NO MITIGATING CIRCUMSTANCES

The Board's efforts to minimize American's and San Francisco's *ex parte* attempts to influence its decision and its conclusion to do nothing about those activities do not square with the principles established by this Court in the foregoing cases. The Board's findings of absence of venality, personal misconduct by any Board member, wrongdoing by third parties, clandestine meetings or corrupt tampering do not purge the proceeding of the taint of the pressure tactics employed by American and San Francisco. This is perfectly clear from this Court's decision in the *Sangamon* case. Although no member of the Federal Communications Commission had been disqualified, no applicant had been disqualified, and the Commission proposed to permit the parties to refute *ex parte* presentations that had been made, the Court there insisted that basic fairness, which required adjudicatory administrative proceedings to be carried on in the open, could only be achieved by a fresh start.

The Board's contention that the violations committed did not prejudice United or TWA or deprive them of a fair hearing is, likewise, inadequate. The sincerity of the Board's statement that neither it nor any of its members were influenced by the *ex parte* efforts of American and San Francisco, is not questioned. But that does not dispose of the issue of prejudice. The Board and all of its members were subjected to pressure.[*] Who can say, when exposed to pressure, that he was not unconsciously influenced by it. As observed in *Peck* v. *Pierce,* 63 Conn. 374, 28 Atl. 524, 528 (1893), "the operations of the human mind are so subtle, and the influences which affect it so difficult to be appreciated, that it is utterly improbable, not to say impossible" for any trier of the facts to actually know whether or not he had been influenced by improper material.

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[*] The Board, in an attempt to minimize the exposure of its members to *ex parte* matters during the course of the proceeding below, asserts that most of the objectionable communications were addressed to the Board and not individual members, that they were of a type not seen by its members and that communications addressed to the Chairman could not have influenced him in view of

The Examiner attempted to brush aside the issue of prejudice by claiming that United and TWA could not have been harmed by *ex parte* communications occurring prior to June 26, 1957, because the Board at that time denied American's motion for expedition, that they could not have been injured by *ex parte* communications occurring between that date and the Board's later grant of American's motion because the ordering of a hearing did not assure certification of a third nonstop carrier, and that again they could not have been seriously affected by later communications because they were lesser in number than those occurring during earlier stages of the proceeding (Tr. 10465-66). That kind of an analysis overlooks important facts. As the Board itself found, *ex parte* communications were not at any time confined exclusively to the question of granting American's motion for expedition. In many instances, from the beginning to the end of the case, they also were directed to the merits of the third carrier issue (Tr. 10287-90,

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his dissent (Tr. 10303). However, the record discloses a number of instances in which *ex parte* communications were addressed not only to the Board or its Chairman, but to other or all Board members and still other instances in which replies to such communications bear the legend "Coordinated with Board Members" (Tr. 165-169, 174, 176, 204, 207, 211, 214, 260, 435, 405, 505-506, 510-513). Moreover, insofar as the barrage of publicity engendered in the press by American and San Francisco is concerned, it may be noted that the Examiner found that the Board maintained a commercial clipping service and that editorials and newspaper stories received from that service were circulated among the members of the Board (Tr. 10359).

10293-96). Of even more importance, the record on its face, shows that United and TWA were indeed prejudiced by being forced to a hearing on American's application out of its normal order and before concrete data as to operating costs and traffic stimulating effects, if any, of newly introduced jet aircraft could be ascertained from actual operations. While it is true that this Court, in its earlier opinion, held that the Board's decision was supported by substantial evidence, the Court was not then passing upon the present question of prejudice to United and TWA resulting from the improper activities of American and San Francisco. That the possibility of prejudice exists is evident from the dissent of two members of the Board from its original decision. Speaking specifically on the question of lack of evidence with respect to the economic impact of jets, the dissenting members of the Board said (Tr. 4776):

> "Because of the transition to jets, and the substantial differences in terms of speed, capacity, and their effect on maintenance, flight patterns, traffic, and the training of crews, both flight and ground, there is no way of arriving at any precise determination of costs, break-even load factors, or traffic stimulation without actual experience. The evidence in this record will not permit such a determination, and it does not, therefore, give the Board the opportunity to critically study and analyze the impact of jet aircraft with respect to the issue of public convenience and necessity."

All members of the Board were agreed that evidence as to actual jet operations would have been important. At issue was only the extent of its importance. Whether considered from the viewpoint of the minority or the majority, therefore, the evidence now available would provide the basis for a more informed decision than the conjecture upon which the earlier orders of the Board were predicated.

Equally devoid of merit are the Board's efforts to minimize American's and San Francisco's violations by asserting (a) that its Principles of Practice were ambiguous in that it did not clearly appear that they applied to communications directed to activation of a case and (b) that the majority of the offending activities occurred during the earlier phase of the proceeding. The fact is that the Board's Principles of Practice restate commonly accepted canons of judicial ethics, which obviously apply to any proceeding required by law to be decided on an evidentiary record. No one would be heard to say that the canons of ethics are ambiguous in their application to efforts to influence a tribunal by off-the-record actions. No one would have the temerity to argue that the conduct indulged in by American and San Francisco before the Board would be tolerated by any Court. Also ignored is the question whether the legitimate appearances of members of Congress at oral argument may have had greater impact upon the Board by virtue of the continuous stream of *ex parte* communications which American and San Francisco had elicited from these same Congressmen throughout the proceeding. The whole rationale of the Board's contention appears to be that the more violations of its rules a party commits at the beginning of a case, the less is the significance to be attached to a proportionately smaller number of violations committed in subsequent stages of the proceeding. The invalidity of that proposition is obvious.

These same considerations also dispose of the argument that recision of the award is not required in order to vindicate the Board's processes. The Board's further statement in this connection that the proceeding below was a licensing and not an enforcement case, is of no moment. The *WKAT, Massachusetts Bay* and *Sangamon* cases were licensing proceedings too. Yet this Court insisted that even in licensing proceedings "No public interest in service or capacity for service is paramount to the public interest in the integrity of the adjudicatory processes of government."

III.

RECISION OF THE AWARD TO AMERICAN WILL NOT ADVERSELY AFFECT THE TRAVELING PUBLIC.

There remains for consideration the question whether the termination of American's New York-San Francisco nonstop service through a setting aside of the award to it would adversely affect the traveling public. The answer is in the negative.

While the data contained in the affidavit attached hereto as Appendix B is not a part of the formal record in the case, United respectfully requests the Court's leave to submit the same for its consideration. The material is relevant to the subject presently under discussion.

At least three significant facts are disclosed by Appendix B. First, it shows that during the twelve months from February 1, 1961, through January 31, 1962, United and TWA together scheduled from 1½ to almost 2½ as many New York-San Francisco nonstops per week as did American.* Secondly, it shows that the load factors (i.e., the percentage of seats occupied by passengers) on United's nonstop flights between these cities averaged 47.6% during the same period. Thirdly, it shows that, to the best of United's information, TWA also experienced an average load factor of less than 50% during that period.

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* The number of New York-San Francisco daily nonstops operated by United and TWA respectively during the past year are approximately the same as TWA, at the time of the original hearing below, expected to be providing in 1961, and less than those that United anticipated that it would be flying during that year (Tr. 3184-3185, 3200). They have not exceeded the three daily round trips per carrier that the Board expected would be operated as early as the preceding summer of 1960 (Tr. 4742).

These low load factors mean that United and TWA are operating literally hundreds of empty seats every day on their nonstop flights between New York and San Francisco —in fact, more empty seats than seats that are occupied by passengers.

The ability of United and TWA to add such further capacity as condititons might warrant is obvious. Aside from this fact, however, and assuming as would be reasonable that load factors of American have been comparable to those of United and TWA, those carriers already have sufficient unused capacity on present flights to handle all of the traffic being carried by American. This may not be decisive of the question of whether duplicating service by a third carrier would be justified, but it is clear evidence that the public would not suffer for want of service during such period as it might take the Board to review the question of whether third carrier service is, in fact, warranted. There is no public interest, therefore, which would militate against recision of the nonstop award to American.

CONCLUSION

For the reasons hereinabove set forth, United Air Lines, Inc. respectfully prays that the orders of the Civil Aeronautics Board under review and the Certificate of Public Convenience and Necessity issued to American Airlines, Inc. pursuant thereto be set aside, that the case be remanded to the Board with instructions to conduct an entirely new proceeding and that United Air Lines be granted such other and further relief as the Court may deem proper.

Respectfully submitted,

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APPENDIX A

The pertinent provisions of the Federal Aviation Act are as follows:

Section 401 (a-c) (49 U.S.C. 1371, 72 Stat. 754-55):

"(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

Section 1001 (49 U.S.C. 1481, 72 Stat. 788):

"The Board and the Administrator, subject to the provisions of this Act and the Administrative Procedure Act, may conduct their proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice."

The pertinent provisions of the Administrative Procedure Act are as follows:

Section 10(e) (5 U.S.C. 1009(e), 60 Stat. 243):

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions

> of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The pertinent provisions of the Principles of Practice of the Civil Aeronautics Board are as follows:

> Section 300.2(a), (c) (14 C.F.R. §300.2(a), (c)):
>
> "Hearing cases; improper influence. It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases:
>
>> (a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law."
>>
>> * * *
>>
>> (c) It is improper that there be any effort by any person interested in the case to sway the judg-

ment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case."

APPENDIX B

Affidavit of G. B. Slebos

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

G. B. SLEBOS, being first duly sworn upon oath deposes and says:

1. That he is the Director of Regulatory Proceedings of United Air Lines, Inc.

2. That he has caused an examination to be made of the flight schedules of United Air Lines, Inc. as filed with the Civil Aeronautics Board with respect to the number of nonstop round trip flights per week scheduled by United Air Lines, Inc. between New York and San Francisco during the period from February 1, 1961, through January 31, 1962; that he also caused an examination to be made of the Official Airline Guides with respect to the number of New York-San Francisco nonstop round trip flights per week scheduled by Trans World Airlines, Inc. and American Airlines, Inc. during the same period, and that said schedules and Official Airline Guides disclose the following:

Number of Scheduled New York-San Francisco Nonstop Round Trip Flights Per Week

	By United	By TWA	By American
February 1-May 19, 1961	14	14	17½
May 20-June 10, 1961	21	21	17½
June 11-August 10, 1961	21	21	21
August 11-August 21, 1961	21	21	17½
August 22 - September 23, 1961	17½	21	17½
September 24 - October 28, 1961	21	17½	17½
October 29 - November 30, 1961	21	17½	20
December 1 - January 31, 1962	14	17½	19½

3. That he has also examined records kept by United Air Lines, Inc. in the regular course of business showing the number of revenue passengers and seats available for sale on New York-San Francisco nonstop flights of United Air Lines, Inc. during the period from February 1, 1961 through January 31, 1962, that those records disclose that the average monthly load factor (which is the percentage of available seats actually occupied by passengers) on New York-San Francisco nonstop flights operated by United Air Lines, Inc. during said period was as follows:

	Average Monthly Load Factor
February 1961	57.1%
March 1961	48.1%
April 1961	52.2%
May 1961	43.6%
June 1961	54.9%
July 1961	48.5%
August 1961	52.9%
September 1961	48.5%
October 1961	45.3%
November 1961	35.0%
December 1961	44.4%
January 1962	42.2%

that said records further demonstrate that during said period from February 1, 1961, through January 31, 1962, New York-San Francisco nonstop flights of United Air Lines provided an average of 506 seats per day, carried an average of 241 passengers per day, were operated with an average of 265 empty seats per day and therefore experienced an average load factor for the period of 47.6%.

4. That affiant is informed and believes and, upon such information and belief, states that during the same period

New York-San Francisco nonstop flights of Trans World Airlines, Inc. also operated at an average load factor of less than 50%.

Further, affiant sayeth not.

/s/ G. B. Slebos

SUBSCRIBED AND SWORN TO
before me this 17th day of April,
1962

/s/ Vernon Misch
Notary Public

My Commission expires: July 21, 1962.
(Notarial Seal)

BRIEF OF PETITIONER TRANS WORLD AIRLINES, INC. WITH RESPECT TO REMANDED PROCEEDINGS.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Nos. 15,414, 15,415.

UNITED AIR LINES, INC.,
TRANS WORLD AIRLINES, INC.,
Petitioners,
v.
CIVIL AERONAUTICS BOARD,
Respondent,
AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD.

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United States Court of Appeals
for the District of Columbia Circuit

FILED APR 19 1962

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Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

Statement of Questions Presented.

1. Whether, in a licensing proceeding, intervenors' extra-record activities in organizing and carrying out a pressure campaign designed to influence respondent's decision and resulting in scores of *ex parte* communications to the Board on the merits by influential persons and agitation in the press, prejudiced petitioner and violated its fundamental rights to due process and fair hearing.

2. Whether the extra-record activities of the intervenors violated the Board's procedural regulations.

3. Whether the Board's procedural regulations were so unclear and ambiguous in their terms and applicability in point of time as to excuse the intervenors' illegal activities.

4. Whether the violations of the respondent's procedural regulations in a licensing proceeding prejudiced petitioner, vitiated the proceeding and required a setting aside of the award.

5. Whether respondent, in refusing to set aside the award to prevent a wrong-doer from retaining the benefits of its illegal activities, failed to apply prevailing law.

6. Whether the award should be set aside to protect the public interest in preserving the integrity of the administrative process.

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IN THE

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UNITED AIR LINES, INC.,
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Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD.

BRIEF OF PETITIONER TRANS WORLD AIRLINES, INC.

Preliminary Statement.

This case has been before this Court previously upon petitions for review challenging Order E-14412 of the Civil Aeronautics Board (September 2, 1959) awarding authority to American Airlines to conduct nonstop operations between San Francisco and New York. On May 19, 1960, this Court entered its opinion and order[*] upholding the award against various challenges, but remanding the proceeding to the Board for further hearings and findings on the question of whether the Board's rules had been so violated in relation to the award as to require a setting aside of the order under review. The Court retained jurisdiction and provided that, upon completion of the remanded proceedings, the Board should submit its findings and final report to the Court together with a certified transcript of the hearings.

Pursuant to the Court's order, evidentiary hearings ensued, and, on February 15, 1962, the Board entered its "Opinion on Remand" (E-18027), upholding its previous decision (Tr. 10275, *et seq.*).[**] On March 21, 1962, respondent filed with this Court a Notification of Completion of Remanded Proceedings, a certified copy of the proceedings on remand and a copy of the Board's report (Order E-18027). As part of the same Notification document, petitioners moved this Court to provide for further procedural steps before this Court, stating that they desired to challenge the Board's findings and conclusion on remand, and to submit briefs and to appear in oral argument before the Court in connection therewith, without waiving, however, their position or rights with respect to the issues heretofore decided. This Court entered its order establishing further procedural steps on April 2, 1962. Petitioner amended its petition for review in accordance with the provisions thereof.

Statutes and Regulations Involved.

The statutes involved are the Civil Aeronautics Act of 1938, 52 Stat. 973, *et seq.*, and the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §§1001, *et seq.* Also involved are rules and regulations issued pursuant to such statutes by the Board, known as its Procedural Regulations. Pertinent provisions of the statutes and the rules and regulations are set forth in Appendix I, *infra.*

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[*] *United Air Lines, Inc.* v. *Civil Aeronautics Board,* 108 App. D. C. 220, 281 F. 2d 53 (1960).

[**] The "Tr." references in this brief are to the certified record of the reopened proceedings on remand before the Board. References to "J. A." are to the Joint Appendix of the original appellate proceedings.

Statement of the Case.

The history of the Board proceeding known as the *"New York-San Francisco Nonstop Case"*, CAB Docket No. 9214, *et al.*, which is the subject matter of these appellate proceedings, is set forth in detail at pages 5 through 11 of the Examiner's Initial Decision in the reopened proceeding (Tr. 9631-9637), to which the Court is respectfully referred for a full statement of the initial CAB proceeding on American's application. Briefly, this case had its genesis in a former Board proceeding known as the *Denver Service Case,* in which the Board denied American authority to duplicate the nonstop authorizations of TWA and United between New York and San Francisco on the ground that to grant such application would do violence to the competitive balance essential to a sound air transportation system (Order E-9735, adopted November 14, 1955). This decision was reaffirmed by the Board upon reconsideration which had been sought both by American and the City and County of San Francisco (Order Nos. E-9887, adopted December 30, 1955, and E-9975, adopted February 3, 1956).

On May 3, 1957, American filed a motion requesting the Board to set down for expedited hearing a pending American application for New York-San Francisco nonstop operating rights (J. A. 4-21). The Board first denied this motion but later, on January 3, 1958, reversed itself and ordered a hearing (J. A. 97-100). On September 2, 1959, the Board issued its opinion (Order No. E-14412, J. A. 783-837) granting American's application. TWA and United filed petitions for reconsideration alleging that American and San Francisco had engaged in illegal extra-record activities with the intent of bringing pressure to bear on the Board and influencing its decision (J. A.

838-902). The Board held oral argument on these allegations and subsequently, on November 19, 1959, issued its Opinion (Order No. E-14664, J. A. 944-965) finding, in effect, that no violations had been established in the initial CAB proceeding on American's application.

Upon appeal to this Court from these orders of the Board, this Court remanded the case to the Board for further hearings and findings on the question of whether, as alleged by TWA and United, the Board's rules had been so violated by American and San Francisco in attempting to pressure the Board and influence its decision by *ex parte* representations and extra-record activities as to require a setting aside of the order under review.

Pursuant to the Court's direction on remand, the Board, by Order E-15342, adopted June 7, 1960, reopened the *New York-San Francisco Nonstop Case* for further hearings on the question of the nature and extent of the *ex parte* activities engaged in by American and its supporters. This proceeding was in the nature of an investigation, and the Board's Bureau of Enforcement was designated by the Board as the logical staff component to participate in the further proceedings. Hearings were held in Washington, San Francisco and New York during the period between July 6, 1960 and September 30, 1960. Following the close of the hearings, proposed findings and conclusions were submitted by the parties to the Examiner on November 21, 1960.

On February 20, 1961, the Examiner issued his Initial Decision (Tr. 9627-9823) in which he found that American and the City and County of San Francisco had repeatedly violated the Board's procedural regulations, but excused the violations primarily on the grounds that (a) any defects in the Board's procedures are of long standing; (b) American should not be held accountable for its activities, because the Board has not held others fully accountable in the past; and (c) a decision adverse to American herein would require the reopening of numerous already closed cases. The Examiner also minimized the violations of the Principles of Practice by American, ruling that those Principles did not apply until the Board ordered a hearing, and, in any event, by holding that American is not responsible for activities which it inspired and encouraged.

On February 15, 1962, after hearing oral argument on May 10, 1961, the Board issued its Opinion on Remand (Order E-18027, Tr. 10275, *et seq.*). This opinion contained the Board's findings, conclusions and recommendations, reaffirming its previous award of New York-San Francisco nonstop rights to American. The Board's Opinion on Remand in its most significant aspects may be summarized as follows:

The Board, like the Examiner, found that American and San Francisco had engaged in extensive illegal activities in violation of its Principles of Practice. The Board also, like the Examiner, excused the violations. It did not, however, adopt the same excuses as the Examiner. It found others, as follows: (a) that most of the violations occurred prior to the date the application of American was formally set down for hearing and that its rules were so uncertain in their terms and applicability that American and San Francisco were "reasonable" in interpreting its rules as not applicable to the prehearing phases of the proceeding, and (b) that the violations that occurred during the hearing phase of the case were *de minimis.*

It should be noted that the Board, when it originally considered TWA's and United's allegations of illegal extra-record activity (Order No. E-14664), took refuge in finding that no violations had been proved. Now that uncontrovertible evidence of such violations has been established, the Board attempts to de-emphasize and excuse the violations.

The Board concluded that the proceeding was not vitiated or any party prejudiced by the illegal activities because (a) its rules were ambiguous, (b) there were no allegations of venality or aggravated misconduct, and (c) the Board paid no attention to the extra-record influences brought to bear upon it but decided the case strictly on the facts of record.

Statement of Points.

The Board erred:

1. In concluding that the violations of its Principles of Practice found to have been committed did not vitiate the proceeding and require setting aside of the award to American.

2. In concluding that the violations of its Principles of Practice found to have been committed were not prejudicial to the petitioners.

3. In concluding that there were no violations of its Rules of Practice.

4. In finding that American and the City and County of San Francisco each acted, with one exception, individually, and on its own, in violating the rules and in failing to find, by reason of the relationship of the parties, that American is chargeable with all activities undertaken by others in its behalf.

5. In holding that the efforts of American and San Francisco failed of success in influencing its decision.

6. In finding that American and San Francisco in certain violations by them of the rules acted in good faith and on the basis of a reasonable interpretation of the meaning and applicability of its Rules and Principles of Practice.

7. In finding that its rules were ambiguous and unclear in major respects.

8. In finding that there was a real question as to when and at what stage of this proceeding its rules became applicable.

9. In finding that the illegal activities of American and San Francisco after the case was set down formally for hearing were *de minimis.*

10. In failing to abide by its own procedural regulations and the provisions of applicable law with respect to the illegal activities of American and the City and County of San Francisco.

Summary of Argument.

In the licensing proceeding wherein American was awarded exceptionally important and valuable nonstop operating rights between New York and San Francisco, American and the City of San Francisco engaged in a deliberate and successful pressure campaign to force a favorable decision from the Board. This pressure campaign was multi-faceted and permeated the entire proceeding. It consisted primarily of multiple *ex parte* communications to the Board on the merits of the case from the most influential people that could be enlisted in American's cause, including Senators and Congressmen, and agitation in the local press, including vigorous editorial attacks on the Board. In so doing, American and San Francisco, deliberately and consistently throughout the proceeding, violated the Board's procedural regulations. Their extra-record activities were also in violation of judicially established principles of due process and fair play.

The Board erred in disregarding or minimizing the violations of its rules and by excusing the illegal activities on the grounds that its procedural regulations, or, in other words, the rules of fair play governing its proceedings, were so ambiguous as to be practically meaningless and unenforceable. The Board's findings on these points defy all logic and are not supported by, but are contrary to, the facts of record.

The extra-record illegal activities of American and San Francisco prejudiced TWA. In a licensing proceeding where the existence of a public demand for the proposed service is a determinative factor, the illegal and deceptive formulation by an applicant of the appearance of a spontaneous public outcry for a type of service proposed by the applicant and the inspiration of *ex parte* communications on the merits to the Board, are automatically prejudicial, especially where an opponent is incapable of defending its interests unless by engaging in an illegal counter-pressure campaign.

The Board's findings that petitioners were not prejudiced because it disregarded all the *ex parte* communications and pressure tactics is not binding on this Court. In cases where, as here, a definite possibility, if not absolute proof, of prejudice exists, the Courts must scrutinize the administrative body's decision with the greatest of care.

The extensive violations of the Board's rules and procedural regulations vitiated the proceeding and prevented a fair hearing. The continuity of an administrative body exists not by reason of its members but through the structure in which the agency is established and a rigid and consistent enforcement of its rules and regulations. Fundamental to due process and the guarantee of a fair hearing is the observance of procedural rules and regulations. Results arrived at without observance of such rules will not be allowed to stand.

The award to American should be set aside because American should not be allowed to receive the benefits of an award that it resorted to illegal activities to obtain. To so hold, it is not necessary to find that American is disqualified to operate as a certificated air carrier, but merely to recognize the general rule that a wrong-doer shall not reap the benefits of his illegal acts. Fundamental to a proper decision on this point are the facts that American was responsible for the extensive illegal activities of San Francisco and the exceptional importance and value of the award.

ARGUMENT.

I.

TWA Has Been Denied A Fair Hearing.

The one fact of over-riding importance that has been established by the reopened record is that American and San Francisco, acting in concert, intentionally, deliberately and consistently throughout the licensing proceeding violated the Board's precedural regulations in such a substantial manner as to be prejudicial to TWA. These illegal activities, which can best be characterized as a well-planned and successful campaign to force favorable action from the Board through illegal extra-record influences and pressures, resulted in TWA having been denied a fair hearing in its opposition to American's application and vitiated the Board's approval of such application.

A. The Violations of the Board's Procedural Regulations By American and San Francisco were Deliberate, Substantial and Inexcusable.

1. American's and San Francisco's Wilful Activities Were Widespread, Substantial in Nature and Highly Improper.

There can be no doubt about what the intentions of American and San Francisco were during the course of their illegal activities. To arrive at this intent it is not necessary to assign motives to their actions or otherwise interpret their activities. They made it perfectly plain what they intended to do and that was to carry out a full-fledged, high-pressure campaign utilizing every means at their disposal, including civic representatives, officials of the local and the Federal government, and the press, to bring pressure and influence to bear upon the Board to force a favorable decision. Whatever the merits of their case might have been, they chose not to rely upon the evidentiary record but to buttress it at every turn with *extra-record* expressions of opinion on the merits by the most influential people they could interest in serving their purpose and by constant agitation in the press.

Their purpose was plain from the outset. The campaign was initiated at a meeting of the top public relations and sales officials of American on the West Coast in August 1956, scarcely before the ink was dry on the Board's order denying American's petition for reconsideration in the *Denver Service Case* (Tr. 9643). This meeting was called for the purpose of deciding what American "was going to do next about removing the restriction" (Tr. 9644). What the company decided to do about it is disclosed by intra-company memoranda of November 2, 1956 and May 1, 1957 referring to their plans for a vast pressure campaign, euphemistically referred to by American as its "public relations program", which had as its sole purpose, not only to inform, but also to elicit the support of "newspaper editors, editorial writers, local congressmen, public utility officials, business firms, civic leaders, and any others whose support we desire" (Tr. 8937-8942, 9645).

The campaign was well organized (Tr. 9013-9016). In connection with American's "press, civic and public relations program," lists of "associations, groups, chambers of commerce, newspapers and other publications" in the Bay Area were to be prepared and meetings set up to "block out our program and make specific assignments to the members of our group" (Tr. 9022, 9653). San Francisco, (under the aegis of American throughout the course of this proceeding, as will be shown *infra*) even went to the length of retaining a professional lobbyist to go to Washington, D. C. and arouse Congressional backing for American's cause. The newspapers in the Bay Area duly reported the mounting of what they accurately termed San Francisco's (and American's) "pressure" campaign (Tr. 9119, 9120).

The record in the reopened proceeding shows that this pressure campaign, instituted in the deliberate fashion above outlined for the avowed purpose of influencing the Board, was carried on by the parties unrelentingly at every crucial stage of the proceeding throughout its course from the motion of American for expeditious treatment of American's nonstop application until the final decision by the Board (Tr. 8924, 8925, 8985, 8994, 9037-9061, 9062-9071).

The factual history of this illegal pressure campaign is set forth in considerable detail in the Examiner's Initial Decision (Tr. 9643-9705).* The Court is respectfully referred to that part of the record for an extended statement of the illegal pressure tactics of American and San Francisco. For the convenience of the Court, however, the highlights of this pressure campaign are condensed below.

The "kick-off" of this campaign was American's filing of its motion of May 3, 1957 to sever and expedite its New York-San Francisco nonstop application. Immediately thereafter American and its supporters proceeded to bombard the Board with repeated salvos of resolutions, letters of endorsement of Federal, State and local officials, inspired editorials and news stories, etc., all supporting American's application and all designed to pressure the Board and influence its decision (Tr. 9676, 9677; 9003, 9004; J. A. 254-270, 290-304).

When the Board, in effect, deferred decision on the motion and ordered a staff study, American and San Francisco arranged another bombardment of *ex parte* communications protesting the Board's action and demanding an immediate hearing. American incited San Francisco into protesting this action in an *ex parte* communication to each member of the Board (Tr. 9677). In addition, as the Examiner found, there were 16 other important *ex parte* communications to the Board protesting this action of which 14 were from Congressmen (Tr. 9679; J. A. 372-410).** American's supporters even went to the length of trying to make it appear that the White House was interested in its cause through the device of having a local California politician forward a "Fact Sheet" (prepared by American) to Sherman Adams who, in turn, transmitted it to the Board (J. A. 395-398). And American remained, as always, acting on the sidelines urging its supporters to greater efforts, as witness Mr. Smith's appearance before San Francisco officials in November, 1957 telling them "to keep hammering" at the Board if they wanted to get any action (J. A. 427). Just to leave no stone unturned in the all-important effort to get a hearing set down, American and San Francisco "acting in concert" for improper purposes (as the Board found, (Tr. 10290) arranged an *ex parte* oral argument before the Board at which representatives of the City of San Francisco argued the merits of American's case.* And contemporaneously therewith San Francisco retained a professional lobbyist to go to Capitol Hill and whip up Congressional support for American's proposal (Tr. 9119, 9120).

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* With respect to the Examiner's contention that the extra-record activities of American and San Francisco are common practice in Board proceedings, see testimony of many participants that the activities in this case were without precedent (Tr. 6254, 6268, 6282, 6299, 6306, 6468, 7386).

** The Board would not agree that all of these communications were on the merits, because some merely forwarded letters of constituents or requested information as to the status of the case. But the desired effect was obtained, that is, to let the Board know that Congressmen were interested in the case and that there was apparently a genuine and spontaneous public interest in favor of American.

With respect to the *ex parte* oral argument, the Board stated in its Opinion that "it is clear that the Board did, in fact, restrict the conference to a generalized discussion of San Francisco's transportation problems * * *" (Tr. 10290). An examination of the transcript of the oral argument makes it apparent that this is hardly an accurate description of what transpired (J. A. 973-986). Actually much more time was devoted to a "pitch" for American's application for nonstop New York-San Francisco operating rights than was devoted to San Francisco's general transportation needs. In fact, there were only two fleeting references to San Francisco's needs other than its alleged need for another transcontinental carrier (J. A. 978 and 985). The remainder of the argument by Mr. Martin, on behalf of the San Francisco civic interests, and Mr. Schlesinger, on behalf of San Francisco's business interests, was devoted entirely to the New York-San Francisco nonstop question (J. A. 977-986). Mr. Martin stated that he was prepared to discuss only San Francisco's transcontinental needs (J. A. 978), which he proceeded to do, and one of the Board members asked the city's representatives for traffic figures on its transcontinental travel (J. A. 984).

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* The Board found that this argument was arranged "at the suggestion of and with the support of American" (Tr. 10290).

Also the Board's statements that the "conference" was "well publicized" and a "transcript thereof was made public" (Tr. 10290) create a somewhat misleading impression of notoriety and openness of the proceeding. TWA had no notice of the argument. It was not invited to attend. It had no opportunity to present its views or to rebut the arguments of the City in American's behalf. Indeed, it was refused the right to appear before the Board to present its side of the question (Order No. E-12337, J. A. 439, 442). As for the transcript being "made public"—it was made available to TWA some days after the argument only upon purchase from the reporting firm.

Whether the Board says it was influenced or not by this tremendous amount of *ex parte* commotion, the fact remains that shortly after the *ex parte* oral argument and the Congressional lobbying took place it capitulated and set the case down for hearing. Significantly, the Board found that "both American and San Francisco attributed the ultimate setting down of American's application in no small measure to this [the *ex parte* oral argument] effort."*

Having gained its primary aim of getting action on its application, American and San Francisco allowed the Board a respite from *ex parte* activity and press agitation. But as soon as there appeared to be the slightest hitch in the orderly progress of the hearing the extra-record activity and pressure tactics were renewed (Tr. 8926). Thus, when the Board granted a single postponement in the hearing dates, American instigated an immediate adverse reaction in the press which was brought to the notice of the Board, and the Board heard from a Congressman about it (Tr. 8987-8989; J. A. 119, 123). Similarly, after the case had been submitted to the Examiner and he had been allowed what American considered a reasonable time to get out his report (about 2½ months) and it was not forthcoming, American pressed inquiries to the Board through its allies, demanding "Where is the initial decision?" An American representative was sent to San Francisco (Tr. 8968). Communications were sent to Congressmen and Senators and the press was again alerted. As usual, several *ex parte* communications were addressed to the Board, and editorial comment derogatory of the Board was again duly forthcoming and forwarded to the Board (Tr. 9090-9095; J. A. 131-140).

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* The decisive phase in this case was American's application being taken out of turn and granted an expedited hearing which would not be expected unless the Board found that a *prima facie* case had been established, but which, in this case, TWA submits, was primarily the result of the extra-record pressure campaign.

The pressure campaign was capped off by the rounding up of Congressional support for American at the oral argument. If American's case was to be sufficiently impressive, it was imperative that every Congressman and Senator from New York, New Jersey, Connecticut and California be canvassed and urged to appear at oral argument before the Board in favor of American. To ensure this result, American's representatives started soliciting Congressmen as early as February 1959, several months before the Examiner's Initial Decision was issued (Tr. 6344, 6401-6408). To create the illusion that the public was genuinely interested in American's case and that the Congressmen were not being solicited to support the cause of a private business enterprise, American sent out its sales representatives in New York and New Jersey to solicit American's customers to write their Congressmen, and had representatives of the City of San Francisco work on the California delegation (Tr. 6344, 6401-6408, 9125-9131). That their campaign was successful is shown by the fact that 15 U. S. Congressmen, 11 of whom were from Northern California, and an Assistant of Senator Dodd from Connecticut appeared at the Oral Argument. In addition, it was noted on the record that both California Senators had gone on record in support of American and that about 20 additional New York and New Jersey Congressmen also supported its case (J. A. 776-779).

In summary, as to the *ex parte* communications, as the Examiner states, there are over 400 pages of communications in the Board's public correspondence file of the nonstop proceeding (Tr. 9676). Of these, well over 100 were *ex parte* communications to the Board (J. A. 101-410). In response to a request of the Court, TWA prepared a list of 25 representative *ex parte* communications to the Board on the merits from influential people, including Senators and Representatives which is on file with this Court.*

As examples of *ex parte* communications to the Board on the merits see J. A. 206 (letter, dated May 21, 1957, from Lt. Gov. of Calif. stating: "I believe this service at the present time to be inadequate, and in a measure, discriminatory * * * San Francisco is entitled to have the American Airlines supply them with a non-stop flight to New York"); J. A. 386 ("pressure" letter, dated July 16, 1957, from Congressman stating: "I would like to go on record as being extremely disappointed" in Board's handling of case and "I am hopeful that * * * the Board will see fit to undertake favorable action on the motion of American Airlines"); J. A. 204 (letter, dated May 22, 1957, from travel agent stating "there is truly a specific need for this additional service"); J. A. 363 (letter, dated June 21, 1957, from Congressman stating: "We need this service out of New York"); J. A. 365 (letter, dated June 21, 1957, from Congresswoman stating: "It seems very evident to me that the present day traffic can well stand another direct flight into San Francisco * * * It would greatly add to the convenience of the traveling public if the franchise could be granted").

The record in the reopened proceeding also contains indications that additional contacts were made by legislators with the Board in connection with this matter which are not disclosed by the written communications in the

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* The Joint Appendix references to these communications are as follows: J. A. pages 123, 132, 137, 139, 151, 163, 165, 170, 189, 202, 204, 206, 221, 254-270, 277, 280, 319-326, 329, 348, 390, 392, 394, 395-398, 406.

Board's correspondence file. For example, in letters from California legislators to representatives of the City of San Francisco regarding their activities, the following statements were made: Congressman Scutter stated: "I have discussed this matter with officials of the CAB" (Tr. 9147); Senator Knowland stated: "I have contacted the Chairman of the Civil Aeronautics Board * * *" (Tr. 9150); Congressman Miller stated: "Quite some time ago I approached CAB and made my position on this subject known to them" (Tr. 9156); Congressman Shelley wrote "I am continuing to work on the CAB to grant a hearing on the American Airlines nonstop San Francisco-New York application" (Tr. 9157); Congressman Mailliard wrote "*Informally, I was advised* that failing favorable decision in December, [when the Board was to reconsider its order denying an immediate hearing] Docket No. 5903 [the American application denied in the *Denver Service Case*] might reasonably be expected to come before the CAB in its regular term late next summer, and it was estimated that about 12 to 18 months would elapse thereafter before the final decision might be rendered. *I assure you that I will continue my interest in effecting an early and favorable resolution on the matter*" (Tr. 9162) (emphasis supplied).

There can be no doubt but that the correspondence between Congressmen and the Board was instigated and inspired by intervenors in this proceeding (Tr. 8924, 8925, 9090-9112, 9138-9163, 9219). Also, it is apparent that the agitation in the press including editorials derogatory to the Board were inspired by the intervenors (Tr. 8987-8989, 8994, 9037-9061, 9062-9071, 9140-9144).

2. American and San Francisco Violated the Board's Rules and are Accountable for their Illegal Activities.

There are two sections of what is known as the Board's "Procedural Regulations" that are primarily involved in this proceeding; (1) Part 302 called the Rules of Practice—particularly Rule 14 thereof which deals with participation in proceedings by interested persons who are not parties, and (2) Part 300 called the Principles of Practice—particularly Rule 2 thereof which prohibits private communications to the Board on the merits of a case and attempts to bring pressure or influence to bear on the Board.

The Board held that there had been no violation of its Rules of Practice in the original proceeding on American's application. In making what petitioners believe to be a clearly erroneous holding, the Board was forced into some very curious reasoning. In arbitrary fashion, it stated categorically that its Rules had not been violated because, it said, all communications *that were submitted with the intention of being made a part of the formal record* complied with Rule 14 and *that there was no rule that applied to communications submitted or intended by nonparties not for the formal record.* But what about informal communications on the merits of the case by persons solicited by parties? That is the burden of TWA's complaint in this case. It avails the Board nothing to say that such *ex parte* communications were *not intended* for the record. In fact, the vice of these communications is that they were *not intended* for the record. Where parties, or adherents solicited by the parties, communicate informally with the Board on the merits, the Rules must apply. With respect to nonparties, the Board significantly says in another part of its Opinion that "It is essentially the fomentation of effects by nonparties to influence a Board decision on the basis of nonrecord considerations that is condemned by the Principles" (Tr. 10288, 10289). It clearly is the Board's responsibility, therefore, to see to it that its Rules cover such a situation. Petitioners contend that Rule 14 applies and should have been enforced. If, as the Board says, it has no Rule covering such a situation, then the proceeding is vitiated since the notice requirements of Section 5(a) of the Administrative Procedure Act have not been met.*

When it came to dealing with American's and San Francisco's unmistakable violations of the Board's Principles of Practice by virtue of the unrelenting extra-record pressure campaign outlined above, the Board, in order to uphold its award and to somehow excuse American and San Francisco from their wrongdoing, was forced into the unusual position of having to assert that its procedural regulations, or, in other words, the rules of fair play governing its proceedings, were, in major respects, so ambiguous as to be virtually meaningless.

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* The Board's assertion that it has adopted internal procedures with respect to these matters which has not been formalized by a rule establishes a clear violation of Section 3 of the Administrative Procedure Act.

Thus, it found that Rule 2 of its Principles of Practice "raised many problems of interpretation" and that its "terms were undefined" (Tr. 10283, 10284). Again, it spoke of the "ambiguity of the language used" and the fact that this Rule was allegedly "unclear in major respects" (Tr. 10300, 10301, 10304). Thus it professed to find that terms such as "private communications" and "on the merits" were somehow or other suddenly mysterious (Tr. 10305). The Board stated that these ambiguities are "factors that can and *must be accorded substantial weight* in determining whether further action is required on our part" (Tr. 10305) (emphasis supplied).

Of course, this argument is pure fabrication. A reading of the Principles makes it clear that they are readily understandable, and certainly the terms "private [or *ex parte*] communications" and "on the merits" are common legal parlance. The Board convinces no one when it ponders over whether a private communication is made public by placing it in the so-called "correspondence section" of the docket (Tr. 10281, 10282). Notice of all contentions of opposing parties and the right to meet them are the keystone of fair play and due process, and the vast majority of the informal communications on the merits in this case were not served on TWA. See *Morgan* v. *U. S.*, 304 U. S. 12, 18 (1937); *Interstate Commerce Commission* v. *Louisville & Nashville Ry.*, 227 U. S. 88 (1913).

The Board also blandly accepts American's argument that it didn't believe that the Board's rules of fair play were applicable until a case was formally set down for hearing—again because of the "ambiguous", "unclear" and "uncertain" wording of the rules (Tr. 10301). This is an astounding concession on the part of the Board, especially since Rule 1 of its Principles of Practice requires, as a general rule, that the Board, its staff and "the parties and attorneys appearing before it [observe] the highest standards of judicial and professional ethics." Certainly, these provisions would rule out *ex parte* communications on the merits and pressure tactics at any stage of an adversary proceeding.

The Board's hesitancy to declare its Principles unambiguous in this respect is difficult to reconcile with the Board's holding to the contrary in Order E-14664 (in this proceeding). There the Board stated that its rules applied to the prehearing phase of the case—a holding which, as just noted, the Board re-affirms in this case (Tr. 10284, 10285). It should also be noted that these rules were promulgated in March 1951. Shortly thereafter the Board issued an explanatory statement which made clear that these rules were designed to prohibit the type of extra-record activity which has been engaged in here. In this release, entitled "Statement With Respect to Practices and Procedures Before the Board" of November 8, 1951, it said:

> "And parties have sought to bring pressures to bear upon the Board in relation to specific cases pending before the Board for decision. It seems almost superfluous to state that practices such as these are an affront to the Board, are destructive of a prompt and orderly disposition of cases, and unfair to parties comporting themselves properly, and, if permitted to continue, must inevitably tend to defeat the objectives of the Civil Aeronautics Act. This being so, such practices cannot and will not be condoned."[9]

The Board had thus interpreted its rules and made plain their meaning at an early date—and why American, a seasoned practitioner before the Board, is now allowed to misinterpret them remains unexplained.

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[9] Also see *Air Transport Associates, Enforcement Case,* 14 C. A. B. 805, 813 (1951).

Finally on this point the Board accepts another of American's specious arguments in mitigation of its illegal activities. And that is the assertion that prior to the time the case was set down for hearing there were no "parties" on whom service of the *ex parte* communications could be made (Tr. 10305). That argument is sheer nonsense. Here everybody knew who the parties in interest were. They were American who wanted to obtain New York-San Francisco nonstop operating rights and TWA and United who had such rights and would obviously be harmed if American was successful in obtaining equal rights. In fact, it was well known that TWA and United vigorously opposed American's application for similar authority in the *Denver Service* case, *supra.* Thus, when American filed its motion for expeditious hearing it knew who the adversary parties in interest were—it served these papers on TWA and United (J. A. 20). When San Francisco held its meeting on the question of supporting American's motion, it knew who the adversary parties were and, accordingly, invited TWA and United (Tr. 9651). And when the Board sent back one of San Francisco's communications on the merits and directed it to serve copies on the parties in *compliance with its Rules of Practice*—the City served TWA and United (J. A. 93-95, Tr. 9677-8). The implications of the facts just recited—that is, that the formalities of notice were observed in connection with the proceeding on the motion and that the Board notified one of the parties that the Board's Rules of Practice applied to the proceedings on American's motion to expedite—are readily apparent. If the notice requirements of the Rules of Practice applied to formal documents relating to the motion, they also should have been applied to informal communications on the merits in connection with the motion. And if the Rules of Practice applied to the motion, obviously the Principles of Practice had equal application.

With respect to the violations that occurred after the case had been set down for hearing, the Board downgraded them as *de minimis.* But, as seen from the history of the extra-record activities set forth on pages 11 to 14, *supra,* they were substantial, continuing and prejudicial. Instead of only one *ex parte* communication during the actual hearing phase, as the Board says (Tr. 10298), there were actually at least 12 and all were from Congressmen (Tr. 9690, 9691, J. A. 101-197). Of course, the Board would say that these latter communications were from nonparties and therefore not forbidden by its rules. But they were instigated by American, were *ex parte* and mostly on the merits, and were the same kind of extra-record activity that the Board condemned in the prehearing phases and were certainly just as harmful and prejudicial to TWA. The above history also shows a continuation of press agitation during the hearing phase, rather than a diminishing thereof, in that on *every appropriate occasion* American continued to solicit the press to advance its cause through obtaining favorable publicity or editorial comment all of which were communicated to the Board. See pages, 13-14, *supra.*

Also, the Board brushes off all of American's extra-record activities in connection with soliciting Congressional support for the oral argument in the reopened proceeding as in accordance with Rule 14 and judicially approved in *Eastern* v. *CAB,* 271 F. 2d 752 (C. A. 2d 1959). But the Board overlooks the extra-record efforts of American to deliberately mislead Congressmen by creating a false impression of wide-spread public support through solicitation of American's customers, users and persons with whom it did business, to write their Congressmen and request support for American (See page 14, *supra*). While soliciting Congressmen directly may have been an acceptable practice under Board procedure,* certainly American overstepped the bounds of propriety when it deliberately set about to create a false and misleading impression of public support for its proposal. It is impossible to determine how many letters were sent to Congressmen by constituents and how much effect such letters had on influencing Congressmen to appear on behalf of American. But it does appear that there was some response as is shown by the travel agent correspondence, inspired by American, between such agents and Congressmen that found its way into the Board's files (J. A. 142-192).

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* The Board by its amended rules has now placed some restrictions on this practice (Tr. 10306).

The most significant aspect of this part of the factual record, however, is not the precise number of *ex parte* communications, but the revealing light it casts on the motives and activities of American. The Board has sought to excuse American's activities as undertaken in good faith under an honest misunderstanding of the applicability of the Board's rules—however difficult those propositions may be to accept. But the facts above recited as to American's activities make a mockery of the Board's "good faith" argument. They show that American continued the same sort of tactics during the course of the hearing as it did before. They also provide convincing support for TWA's assertion that American's argument that it acted under a good faith misinterpretation of the rules was strictly an after-thought, or an *ex post facto* rationalization of its misconduct. It is now plain that there was no change in American's tactics. American was obviously under no illusion that prohibitions against *ex parte* communications or extra-record activities came into being after the hearing was set down. In the light of these facts, the slackening off in the intensity of these activities cannot be attributed to any respect for the Board's rules or procedures, but was, more likely, merely the result of American's having largely achieved its goal making further *ex parte* communications cumulative. Also there were simply not so many opportunities or occasions for arousing public protests to the Board. In other words, the Board had been "brought into line" and it was progressing satisfactorily along the path that American had set for it.

B. American's Violations Were Prejudicial to TWA and Denied it a Fair Hearing.

1. American's Violations Were Prejudicial to TWA.

The Board dismissed TWA's assertion that it was prejudiced by American's violations by affirming the Examiner's decision that such prejudice was not, in fact, shown by TWA (Tr. 10302). It also affirmed the previous Board's decision that it had not been influenced by the extra-record activities so no prejudice could have occurred (Tr. 10303).*

This latter proposition is particularly difficult to accept. The Civil Aeronautics Board is a creature of Congress and it is inconceivable that the Board does not give serious consideration, consciously or unconsciously, to communications received from Congressmen, especially when they do not limit their activities to the customary appearances at oral argument but, as here, send inquiries and letters to the Board throughout the course of the proceeding thus evidencing an unusual concern and interest in the case. In such a situation, the Board is obviously not the body best qualified to impartially weigh all the elements that entered into the decisional process and affected its final determination. Or as the Department of Justice stated in its Brief to the Board: "* * * there is no real way to determine whether these actions calculated to bring editorial and Congressional pressure upon the agency may not have had an unconscious effect upon the Board's decisions" (Tr. 10077).

TWA submits that it was obviously prejudiced by the extra-record activities of American and San Francisco in this case. In any licensing proceeding the determinative question is whether the service or privilege applied for is required by the public convenience and necessity or, in other words, whether there is any "public demand" for the service. In such cases, therefore, if there should occur an entirely spontaneous outpouring of demand for the service from many responsible representatives of the public—such as civic representatives and organizations, legislative leaders and the local press—the Board could not, in all honesty, say that such would not be accorded great weight in arriving at its decision. A deafening public clamor was raised in this case, but it was not spontaneous. It was mostly manufactured, engineered and inspired by American operating behind the scenes. It is conceded that, *if* the Board should have on its own motion set down a hearing on the question of a third New York-San Francisco carrier, San Francisco would have urged that it be granted. But it is just as obvious that, without the extensive organizational efforts of American and its continuous and energetic coaching and goading of the civic representatives and legislative leaders, the "public clamor" would have been far less. And it is certain that, without American, there would have been no *ex parte* oral argument, and the press would not have been fed the ammunition with which to attack the Board. Where, therefore, as here, an applicant deliberately manufactures a public outcry in support of its case in deliberate violation of the rules of procedure, it gains an unfair and overwhelming advantage over the opposing parties which automatically results in prejudice.

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* Lest it be again argued that the Board ignored the *ex parte* communications, it should be noted that practically all were acknowledged, mostly by Board members (J. A. 101-410; Tr. 8990, 8991).

A recent leading television case* *Sangamon Valley Television Corp.* v. *United States,* 106 App. D. C. 30, 269 F. 2d 221 (D. C. Cir. 1959) and App. D. C. , 294 F. 2d 742 (D. C. Cir. 1961), in which *ex parte* contacts and activities were found to have vitiated the proceeding, is much in point.** In that case the *ex parte* activities were mostly *ex parte* discussions of the case by a party with Commissioners, and personal favors or hospitality accepted by Commissioners from a party in an adversary proceeding. But it is not possible to say that such personal contacts were more or less prejudicial than the determined pressure campaign undertaken by American and San Francisco in this case which loosed upon the Board such a flood of *ex parte* communications and castigations of the Board by the press. Indeed, it was highly probable that the *ex parte* activities here were more prejudicial because they were covert, and the Board, at the time it first passed on the question, did not realize that they had been engineered by American and San Francisco.

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* The case is particularly strong because it was a rule-making proceeding, and hence legislative in character, in which function the right of lobbying has been historically recognized.

** The alleged distinctions between the television *ex parte* cases and the instant case asserted by the Examiner (with which the Board concurred) were found "misguided" by the Department of Justice in its brief to the Board (Tr. 10079).

In any event, TWA submits that in this case the Court may not accept the Board's findings that it was not prejudiced. It has been held that in a proceeding where the record indicates the possibility of prejudice, the Court should scrutinize the administrative body's decision with the greatest of care. *Wisconsin Telephone Co.* v *Public Service Commission,* 232 Wis. 274, 287 N. W. 122, 149 (1939), *cert. denied,* 309 U. S. 657. In the present case there are at least four instances in the course of the licensing proceeding where there was a definite possibility, if not a probability, that the illegal activities were determinative and, therefore, prejudicial.

(1) But for the "hoop-la" surrounding American's motion to expedite of May 3, 1957, there is a reasonable possibility (at the very least) that the Board, since there was no factual justification for granting it, would simply have denied it outright, rather than taking the unique step of denying it and ordering a staff study;

(2) But for the *ex parte* conference of December 2, 1957 and events surrounding it, there is a reasonable possibility (at the very least) that the sharply divided Board (3 to 2) would not have reversed itself by granting American's motion; and

(3) But for all the *ex parte* matter to which it was subjected from the outset of the proceeding to its conclusion, there is a reasonable possibility (at the very least) that the sharply divided Board would have denied American's application.

(4) Had the Board been fully advised of the facts showing that its exposure to *ex parte* matter was in no respect accidental, there is a reasonable possibility (at the very least) that the sharply divided Board would have granted TWA's and United's petitions for reconsideration.

In the ordinary case, the fact of prejudice must be determined solely by deduction from the circumstances. But here it is much clearer. There is documentary proof from the reopened record that the actions of the Board on the second of the four occasions noted above gave the substantial appearance of having been influenced by incompetent matter, submitted *ex parte*. And this proof is supplied largely out of the mouths of our adversaries, and wholly from knowledgeable sources. On January 14, 1958, the San Francisco Examiner termed the Board's order "a clear victory for San Francisco city officials who had lobbied vigorously for just that decision" (Tr. 9122). Mr. Martin, President of the Public Utility Commission of San Francisco, credited the result to the "efforts of Senators Knowland and Kuchel, and Representatives Mailliard and Shelly * * * the Mayor, the Board of Supervisors, the San Francisco Chamber of Commerce, the Downtown Association, business and labor organizations and our Public Utilities Commission" (*Ibid;* Tr. 7375, 7423). The San Francisco Chronicle of January 15, 1958 described the decision as "sweet victory to many Bay Area political leaders and civic groups" and noted Mr. Cleary's lobbyist mission "to organize support for the hearing" (Tr. 9123). Mr. Strickler, one of American's Washington representatives, credited the Board's action to "the untiring, united and unparalleled efforts put forth by your city government, the Chamber of Commerce, the newspapers, the groups in Oakland and this very [the Downtown] association * * *" (Tr. 8928). Mr. Martin is a lawyer; the San Francisco Examiner and Chronicle are leading American dailies; and Mr. Strickler, who has enjoyed a long identification with Board matters, was particularly close to this case. Their unanimous view that the Board's reversal of January 13, 1958 of its previous order was accomplished by the *ex parte* conference of December 2, 1957 and related events is incontrovertible proof that TWA's interests were fatally prejudiced thereby.

Finally, the Board argues that TWA was not prejudiced because it had constructive notice of the illegal activities and *ex parte* communications since all the so-called informal communications were filed in the correspondence section of the file (Tr. 10282). As stated previously, however, TWA had no actual knowledge of this activity or the extent of these communications and it is not chargeable with such knowledge.

But the point is that such notice, constructive or otherwise, is immaterial. TWA is helpless in such a situation, as existed here, unless this court steps in and protects its interests. Even if TWA knew of the nature and extent of the illegal pressure tactics being engaged in by American and San Francisco, what was it to do? Tell the Board about it? That would have been a useless gesture, as is readily seen from the Board's opinion in this case. Its only other alternative would be to launch an illegal counter pressure campaign. Certainly no one would seriously urge such a course of action. Lest it be argued that TWA would be justified in adopting counter measures, it need only be pointed out that the F. C. C. has correctly held that self-defense is not an effective plea in such situations. In *WKAT, Inc., et al.*, 29 F. C. C. 216 (1960), the Commission disqualified an applicant for *merely attempting* political and extra-adjudicatory pressure—primarily because it retained a former Congressman to "be of some help to us on the Hill" allegedly to counteract the rumored political efforts of other contesting parties.[*] See also *Biscayne Television Corp., et al.*, 31 F. C. C. 237 (1961).

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[*] It was never proved that *any* Congressional *ex parte* contacts by Congressmen with the Commission resulted. In this case, as we have seen, there were numerous and continuing Congressional *ex parte* contacts with the Board.

2. The Violations of the Board's Rules Vitiated the Proceeding.

As shown previously herein, there were multiple violations of the Board's rules, including Rule 2(a) and (c) of its Principles of Practice and Rule 14 of its Rules of Practice. In addition, Rule 18 (4 C. F. R. 302.18), limiting the submissions in support of a motion to a single timely answer, was violated by the Board's acceptance of numerous submissions, from parties and non-parties alike, in support of American's motion for expedition after the cut-off date. These included the oral argument submitted by San Francisco. To the extent that the submissions received after the hearing contain allegations of fact (*e. g.,* J. A. 146), they violated Rule 24(j) (14 C. F. R. 302.24(j)), and to the extent they contain argument (*e.g.,* J. A. 167), they violated Rules 26 and 31 (14 C. F. R. 302.26 and .31). In short, since none of these submissions was countenanced by any rule, all were in violation of the body of rules governing practice before the Board.

As a general rule, it is established that results arrived at without observance of agency rules will not be allowed to stand. See *Service* v. *Dulles,* 354 U. S. 363, 372-3 (1957); *Sangamon Valley Television Corp.* v. *U. S.* (*supra*).

Of paramount importance is the right of a party in a judicial proceeding to be appraised of all the material and evidence used against it by other parties in the proceeding. This principle is the hallmark of a fair hearing long protected by the courts. *Morgan* v. *U. S., supra; Interstate Commerce Commission* v. *Louisville & Nashville Ry., supra; Railroad Comm.* v. *Pacific Gas & Elec. Co.,* 302 U. S. 388 (1937); *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190 (1933).

TWA, of course, had no notice of or opportunity to rebut the extensive *ex parte* communications on the merits in this case and was thereby denied the rudiments of a fair and impartial hearing.* The court in *Ohio Bell Tele-*

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* Such rights are guaranteed by Section 7 of the Administrative Procedure Act. This section further provides that the formal record shall be exclusive for decision.

phone Co. v. *P. U. C. of Ohio,* 301 U. S. 292, 302 (1937), stated the impact of a failure to meet such a requirement at a hearing, as follows:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out."

As is obvious by now, it is just as difficult to find out what factors influenced the Board in reaching its decision. The reason for requiring adherence to an administrative agency's established rules and principles is made clear by the history of this proceeding.

The Board, as mentioned previously, is not the same Board in 1962 as it was in 1957 when this proceeding began. It is difficult, if not impossible, for a group of men several years after the event to determine just what happened in the decision making process, particularly when only a few of the persons participating in that earlier decision remain. The continuity in an administrative body exists not through the men comprising the agency but through the structure in which the agency is established, namely, its rules and principles. If such rules and principles are ignored, or even slighted or diminished in effect, or found at a later date to be, for convenience sake, ambiguous, the entire administrative process necessarily bogs down since no party in an administrative proceeding can ever be certain as to just what rules will be upheld and which rules ignored in such a proceeding.

The series of *Morgan* cases have made clear the courts' adherence to strict standards when the rights of parties to a hearing are involved. In *Morgan* v. *U. S.,* 304 U. S. 12, 18-19 (1937), the court stated:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet

> them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.
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> * * * * * *
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> "Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."

and, as pointed out, *supra,* page 25, where the record indicates some prejudice, the court must scrutinize the administrative body's determinations with the greatest of care. In *Wisconsin Telephone Co.* v. *Public Service Commission, supra,* the court found:

> "Under such circumstances the evidence necessary clearly and satisfactorily to establish the fact that the findings of the Commission were wrong is much less than it would otherwise be and the force of the contention made on behalf of the Commission that the trial court did not give sufficient weight to the findings of the Commission is greatly diminished if not wholly dissipated."

It is impossible to avoid the conclusion that TWA did not receive a fair hearing. The lack of a fair hearing voids the case entirely and there can be no mitigating circumstances or excuses as to why the hearing happened to be unfair. Not only must the hearing be fair but there must be the appearance of fairness. *Root Refining Co.* v. *Universal Oil Products Co.,* 159 F. 2d 574 (3d Cir. 1948); *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U. S. 238 (1944); *Peck* v. *Pierce,* 63 Conn. 374, 28 Atl. 524 (1893). The Department of Justice stated in its Brief to the Board "* * * activities of the type revealed in this record clearly have tended to negate at least the appearance of fairness * * *"

(Tr. 10076). If the rules and regulations in all future administrative proceedings are to be protected, it is necessary that the court vacate the award since the hearing was totally lacking in the quality and appearance of fairness.

II.

The Award to American Should Be Set Aside.

The question of whether the award to American should be set aside hinges not on whether that carrier should be disqualified, although TWA believes it should be, but whether it should be allowed to keep the fruits of an award obtained in a proceeding colored by its illegal acts.

As a general proposition, it need scarcely be argued that an applicant should not be allowed to keep the benefits of an award that it attempted to obtain through illegal means. See *Root Refining Co.* v. *Universal Oil Products Co., supra,* and *Sangamon Valley Television Corp.* v. *U. S., supra.* And in this case petitioners are clearly entitled to a hearing unprejudiced by the existence of the award, because the very nature and extent of the illegal activities of American and those instigated by it so compromised the proceeding as to make a fair hearing impossible.

And there is no question but that American is to be held responsible not only for its own improper acts, but also for the violations of the Board's Principles of Practice committed by San Francisco. Starting with American's filing of its motion to expedite on May 3, 1957, American has been the driving force behind most, if not all, *ex parte* activities carried on by other parties. The form and contents of the motion itself, complete with elaborate art work, were indicative of American's intent to use it for propaganda purposes (J. A. 5-21). The fact that it printed 250 copies of this document proves that American intended widely to distribute the document to media of communications far removed from those necessary to a normal motion being filed under Rule 18 (Tr. 8852). From that point on American obviously was carrying out a plan which it had developed to insure favorable action by the Board on its motion.

American drafted and circulated throughout the Bay Area forms of resolutions in support of its position and suggested that they be sent to members of Congress (Tr. 7541-7544). It was Mr. Strickler of American who suggested to San Francisco that the City seek an *ex parte* conference with the Board to urge the merits of American's motion and application and briefed the City's representatives for their presentation before the Board (Tr. 6132, 6177-6185, 10291).

Throughout this proceeding American and San Francisco exhibited the closest possible collaboration (Tr. 5886, 5908-5910, 7375, 7388-7389, 7391-7392, 7399, 7401, 7409-7410, 7419, 7432-7433, 7435, 7438, 9005-9009, 9082-9086). The extent of this collaboration is also indicated by the nature and amount of American's activities in the Bay Area (Tr. 8986, 9170-9171, 9653-9656), by the fact that, during the pendency of this proceeding, representatives of American made about 40 trips to San Francisco to confer with the City about it (Tr. 9648), and by the fact that one of American's representatives in San Francisco was characterized as the City's "errand boy" in connection with its activities in this matter (Tr. 9671). Without further cataloging the activities of American personnel, TWA submits that it is apparent that this whole campaign was organized and engineered by American and that it was, therefore, directly responsible for the exposure of the Board to incompetent *ex parte* matter submitted by others bearing exclusively on the issues in the case throughout its entire course.

The law is clear that in a conspiracy to commit an illegal act no formal agreement is necessary. *American Tobacco* v. *United States,* 328 U. S. 781 (1946). The basic requirement in order to hold that a conspiracy exists is to show concert of action between the parties. *Truax* v. *Corrigan,* 257 U. S. 312 (1921). A person to be held as a conspirator, in fact, need not have committed any of the illegal acts at all. He need only have been involved in the planning of such acts. *Gebardi* v. *United States,* 287 U. S. 112 (1932). The general rule is well settled that, if a conspiracy does exist, any act done by any of the participants in *pursuance of the original plan and with reference to a common object* is the act of all. In *Northern Kentucky Teleph. & Teleg. Co.,* 73 F. 2d 333 (6th Cir. 1934), *cert. denied,* 294 U. S. 719, it was held that each conspirator is responsible for everything done by his fellow conspirators which follow, incidentally, as one of the probable consequences in the execution of the common design. See, *e. g., Boyd* v. *United States,* 142 U. S. 450 (1891).

Few licensing proceedings in history have been of greater importance than the instant proceeding. The value of the award to American amounts to at least $12,000,000 annually. Yet every objective observer that has analyzed this case—the Board in Orders Nos. E-14664 and 18027, the Board's Bureau of Enforcement, Examiner Stodola and the Department of Justice—has been unable to find that the proceedings were free from substantial deviations from proper quasi-judicial procedures. And the reopened record has disclosed and confirmed most of the charges made by TWA and United in earlier phases of this case as to *ex parte* activity and the responsibility of American therefor. Under these circumstances, elemental principles of fair hearing to TWA and United and vindication of the Board's processes require the setting aside of the instant award.*

The Court need not be concerned over possible harm to the public interest from such action. TWA and United, two of the leading United States air carriers, are perfectly capable of providing all the service needed by the public. Both carriers are presently operating jet equipment on their nonstop New York-San Francisco services, and there is no basis for speculating that they will not continue to provide the best possible, and perfectly adequate, service.

---

* "A history of law violations or attempts to deceive the Board clearly renders an applicant unfit." (Brief of American in Large Irregular Carrier Investigation, Docket No. 5132, dated July 19, 1957.)

In conclusion, it is submitted that, since it does not appear that the traveling public would be adversely affected by a setting aside of the award, the public interest in the guarantees of a fair hearing and in assuring the integrity of the administrative process is controlling. Both the Board's Bureau of Enforcement and the Department of Justice found that the record showed clear violations and the Bureau recommended that the Board vacate the award (Tr. 10076, 10078, 10143-10144). The Board, however, ignoring the views of the two impartial observers of this proceeding, has attempted to excuse, on one pretext or another, American's conduct. TWA believes that the Board's failure to take proper action is indefensible.

Conclusion.

For all the reasons hereinbefore set forth, the orders under review should be reversed and the award to American set aside.

Respectfully submitted,

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April 19, 1962.

Appendix I.

A. Pertinent provisions of the Civil Aeronautics Act, 52 Stat. 973, as amended.

"CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

"CERTIFICATE REQUIRED

"SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority [Board] shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

* * * * * *

"ISSUANCE OF CERTIFICATE

"(d)(1) The Authority [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

* * * * * *

"AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

"(h) The Authority [Board] upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, * * *. Any interested person may file with the Authority [Board] a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

* * * * * *

"CONDUCT OF PROCEEDINGS

"SEC. 1001. The Authority [Board] may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. No member of the Authority [Board] shall participate in any hearing or proceeding in which he has a pecuniary interest. Any person may appear before the Authority [Board] and be heard in person or by attorney. Every vote and official act of the Authority [Board] shall be entered of record, and its proceedings shall be open to the public upon request of any interested party unless the Authority [Board] determines that secrecy is requisite on grounds of national defense.

* * * * * *

"POWER TO TAKE EVIDENCE

"SEC. 1004. (a) Any member or examiner of the Authority [Board], when duly designated by the Authority [Board] for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United State designated by the Authority [Board]. In all cases heard by an examiner or a single member the Authority [Board] shall hear or receive argument on request of either party.

* * * * * *

"JUDICIAL REVIEW OF AUTHORITY'S ORDERS

"ORDERS OF AUTHORITY SUBJECT TO REVIEW

"SEC. 1006. (a) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable ground for failure to file the petition theretofore. *(Amended May 24, 1949, 63 Stat. 107.)*

* * * * * *

"Power of Court

"(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the Authority."

B. Pertinent provisions of the Civil Aeronautics Board Principles of Practice.

"Principles of Practice of the Civil Aeronautics Board

"300.1. *Judicial Standards of Practice.* In many respects the functions of the Board are similar to those of a court and parties to cases before it and those who represent such parties are expected to conduct themselves with honor and dignity. By the same token, the members of the Board, and those of its employees who participate with the Board Members in the determination of cases upon a record, are expected to conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff. The standing and effectiveness of the Board are in direct relation to its observance, that of its staff, and the parties and attorneys appearing before it, of the highest standards of judicial and professional ethics.

"*300.2 Hearing Cases—Improper Influence.* It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases—

> "(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.
>
> "(b) It is likewise improper that there be any private communication on the merits of a case to a member of the Board or to the examiner in the case by any members of the Board's staff who participated in the hearing as witnesses or as counsel.
>
> "(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case."

C. Pertinent Provisions of Civil Aeronautics Board Rules of Practice.

"PART 302—RULES OF PRACTICE IN ECONOMIC PROCEEDINGS

"SECTION 302.14—*Participation in hearings by persons not parties.* Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned.

* * * * * *

"§302.24(j) *Receipt of documents after hearing.* No document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the Examiner.

* * * * * *

"§302.26 *Proposed findings and conclusions before the Examiner or the Board.* Within such limited time after the close of the reception of evidence fixed by the Examiner, any party may, upon request and under such conditions as the Examiner may prescribe, file for his consideration briefs to include proposed findings and conclusions of law which shall contain exact references to the record and authorities relied upon. The provisions of this section shall be applicable to proceedings in which the record is certified to the Board without the preparation of an initial or recommended decision by the Examiner.

* * * * * *

"§302.31 *Briefs before the Board.* Within such period after service of any initial or recommended decision of an Examiner or tentative decision of the Board, as may be fixed therein, any party to a proceeding may file a brief before the Board in support of his exceptions to such decision, or in opposition to the exceptions filed by any other party. In cases where the Board or the Examiner is of the opinion that, because of the limited number of parties and the nature of the issues, the filing of opening, answering and reply briefs will not unduly delay the proceeding and will assist in its proper disposition, the Board or the Examiner may direct that the parties file briefs at different times rather than at the same time. Except by special permission of the Board or the Chief Examiner, briefs shall not exceed fifty (50) pages in length and reply briefs will not be received."

D. Pertinent Provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001, et seq.

"PUBLIC INFORMATION

"SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of any agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

* * * * * *

"ADJUDICATION

"SEC. 5.(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

"(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

* * * * * *

"HEARINGS

"SEC. 7.(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant [sic] immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

"(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

* * * * * *

"DECISIONS

"SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

"(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject [sic] to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

"(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * * *

"JUDICIAL REVIEW

"SEC. 10. Except so far as (1) statutes preclude [sic] judicial review or (2) agency action is by law committed to agency discretion—

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * * *

"(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * * *

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provision, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15,414 and 15,415

UNITED AIR LINES, INC., TRANS WORLD AIRLINES, INC.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,

Intervenors.

ON REPORT OF THE CIVIL AERONAUTICS BOARD FOLLOWING REMAND

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

In respondent's view, the dispositive questions are:

1. Whether the Board properly determined that the violations of its Principles of Practice found to have been committed by American and San Francisco were not of such nature as to vitiate its proceeding or to disqualify American from receiving the award of New York-San Francisco nonstop operating authority.

2. Whether the Board reasonably concluded that public convenience and necessity standards would require selection of American over Northwest on the basis of comparative evaluation notwithstanding American's violations.

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BOARD FOLLOWING REMAND

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

When this case was earlier considered, the Court affirmed on its merits the Board's order awarding New York-San Francisco non-stop authority to American Airlines. United Air Lines, et al. v. Civil Aeronautics Board, 108 U.S. App. D.C. 220, 281 F. 2d 53 (1960). It remanded the case to the Board, however, for a hearing and determination of "the relevant facts on the question of whether the Board's rules were so violated as to require a setting aside of the order on review" (United Air Lines, supra, 281 F. 2d at p. 58). This action was in response to allegations by the petitioners of ex parte communications and efforts to bring influence to bear on the Board; the Board's findings that some violations by American and San Francisco were shown thereby; and the Court's conclusion that the Board should "conduct a further inquiry into the allegations concerning the actions of American and its responsibility for the actions of others in connection" therewith (United Air Lines, supra, 281 F. 2d at p. 58).[1/] The violations claimed to have occurred were said by the petitioners to be reflected by correspondence in the dockets of the Board proceeding here involved, and by the public transcript of a conference between Board Members and representatives of San Francisco prior to the setting down for hearing of American's application.[2/]

[1/] As disclosed by the Court's opinion and by the Board's Order E-14664 (J.A. 944), the Board had treated petitioners' allegations as if on demurrer, finding some violations by American and San Francisco but no vitiating or disqualifying ones.

The reference "J.A." is to the prior Joint Appendix herein. References "Tr." are to the supplemental joint appendix to the instant briefs.

[2/] The transcript of this conference appears at J.A. 973-986. The various communications received by the Board appear at J.A. 23-25; 41-46; 72-90; 92-95; 101-410. Some of these also appear as part of the exhibits produced by the Bureau of Enforcement (see Tr. 9099, 9105, 9152, 9163). For the most part, these communications were placed in the correspondence portion of the Board dockets involved (as opposed to the docket proper), pursuant to the established Board practice of placing all communications relating to a given case in the public files.

The Board reopened its proceeding as directed by the Court (Order E-15342, Tr. 5499-5501), and voluminous evidentiary hearings followed with the Board's Bureau of Enforcement developing the facts.[3] The reopened proceeding did not reveal "any significant communications to the Board which were not duly filed in the public correspondence dockets of the nonstop proceeding" (Tr. 10281-10282). The Board's examiner, and subsequently the Board, concluded on the basis of findings hereinafter detailed that there were no grounds for vitiating the Board's proceeding, and that the violations found to have been committed by or imputable to American did not disqualify it (Tr. 10277, 10307). The Board further found that such violations would not warrant the selection of Northwest (the other applicant) over American for nonstop authority, since American already served between New York and San Francisco and Northwest did not, and the selection of Northwest would have placed a fourth carrier in the market (Tr. 10307-10308).

It is conceded that any violations which occurred were committed by American and San Francisco (TWA Br., p. 6; United Br., pp. 3, 11). The contentions before the Board concerning such violations and their effect turned in substantial part on questions as to the scope and applicability of the Board's Principles of Practice in relation to various stages of its proceeding, and distinctions between communications on the "merits" of American's application and procedural phases of the case. Accordingly, we here delineate the principal activities involved in relation to various stages of the over-all proceeding, as did the Board's hearing examiner.

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[3] The participants included the Department of Justice in an _amicus_ capacity, and Northwest Airlines, the other applicant for nonstop authority. The contribution of these petitioners to the reopened proceeding consisted of one exhibit by TWA (Tr. 9219) and cross-examination of witnesses.

A. The activities of American and San Francisco

1. The period August, 1956-June 26, 1957

This period marks the interval between American's decision to attempt to obtain a hearing on its application for nonstop authority, and the Board's initial denial of its request for expedited hearing. The activities involved for this period are summarized at Tr. 10332 to Tr. 10363 in those portions of the examiner's report adopted by the Board.

In brief, the Board in 1955 in its Denver Service Case had denied an application by American for New York-San Francisco nonstop authority, to the dissatisfaction of both American and San Francisco. After some preliminary discussions among company personnel, American determined in February, 1957 to attempt to activate a new nonstop proceeding, and it then had pending before the Board an application (Docket 59013) which it had filed in 1953 which encompassed, inter alia, a request for New York-San Francisco nonstop authority (Tr. 10332). American's representatives contacted the chairman of the Public Utilities Commission of San Francisco (which operates the city's airport and otherwise participates on its behalf in matters relating to aviation), the Mayor and the City Attorney's Office, urging San Francisco to file a motion for severance of the portion of the American application seeking New York-San Francisco nonstop authority and an expedited hearing thereon (Tr. 10334). Also, American requested the city officials to indicate a preference for American as the third nonstop carrier. Their requests were refused; the city preferring that American file the application and indicating that it would support a third carrier but not necessarily American (Tr. 10335-10336). On May 3, 1957, American filed its motion for severance and expedited hearing (Tr. 10337, J.A. 4).

Thereafter, the Public Utilities Commission held a meeting to determine whether it should support American's motion for immediate hearing. Representatives of United and TWA attended and argued against such action, and American's representative argued for support (Tr. 10337).[4] The determination was to support the motion; a resolution to that effect was adopted and filed with the Board (J.A. 240); and copies were sent to Congressmen, Senators, and civic organizations seeking similar support. Mayor Christopher and the Chairman of the PUC "each did what he could to solicit support for an early hearing," and this included contacts with members of Congress and "everyone else in the Bay area who had a vital interest in the airport" (Tr. 10400-10401). The San Francisco City Attorney's Office wrote to the representatives of adjacent counties asking them to pass supporting resolutions and to transmit them to their representatives in Congress and the Board (Tr. 10342), and there was close contact between the city officials and American's representatives, with American supplying information to the city (Tr. 10296, 10411, 10414, 10446).

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[4] The record discloses that representatives of the petitioners appeared before several civic groups in opposition to supporting resolutions, and also informally discussed the matter with civic leaders (Tr. 10343, 10348).

American's personnel also actively solicited support in the area, contacting travel agents, chambers of commerce, civic leaders, etc., and urging supporting letters and resolutions to Congressmen and the Board (Tr. 10345-10346). There were contacts with the press, a "memorandum to editors" prepared by American's public relations officer, and favorable editorial comment in the San Francisco area (Tr. 10355-10359). The Washington office of American, through its legislative representative, contacted Congressmen from California, New York, and New Jersey, leaving with them copies of American's motion (Tr. 10340). In sum, during this period, as the Board found (Tr. 10287), "American put forth aggressive efforts to enlist all available support for an early hearing on its application," and San Francisco did the same (Tr. 10293-10294).

The Board denied the motion for an expedited hearing on June 26, 1957 (J.A. 90), but directed its staff to study and report to it by December 1, 1957 as to the public need for an early hearing on the issue of nonstop service. Between February and June 26, 1957, numerous resolutions urging hearing on the matter (many of which endorsed American as the carrier) had been forwarded to the Board. These included resolutions from chambers of commerce or similar organizations,[5] municipal and county groups,[6] and the California legislature (J.A. 339). The governor (J.A. 221) and lieutenant governor (J.A. 206) of the state also forwarded letters requesting an early hearing, and there were several letters from Mayor Christopher which included, among other things, copies of various civic resolutions and newspaper clippings (J.A. 75, 101, 110, 229, 254-270, 290, 334). There likewise were letters from various members of Congress indicating a desire that the Board grant an early hearing on the nonstop application, or an interest in or desire for information on the matter, or referring to or enclosing constituents' letters.[7/] A few communications in like vein were received from travel agents (J.A. 78, 198, 204, 217). The Board's findings were that the communications received during this period accounted for some 262 (221 of correspondence and 41 of newspaper clippings) pages of the total of more than 400 pages of correspondence received relating to the case and, in all, that "77 separate significant communications were received during this period from the Mayor of San Francisco, from numerous Members of Congress, from State and city officials, chambers of commerce, and other community organizations, as well as from certain private individuals." (Tr. 10362.)

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[5] Burlingame (J.A. 82); Belmont (J.A. 24); Vallejo (J.A. 25); Richmond (J.A. 92, 369); Hayward (J.A. 85, 316); Alameda (J.A. 84, 286); San Leandro (J.A. 87, 333); Sacramento (J.A. 200, 293); Sunnyvale (J.A. 201); San Francisco (J.A. 226); San Francisco Labor Council (J.A. 207); San Rafael (J.A. 23, 237); Stockton (J.A. 223); Oakland (J.A. 227); Downtown Association of San Francisco (J.A. 230); Mill Valley (J.A. 250, 291); San Jose (J.A. 252); Berkeley Manufacturers Association (J.A. 308); San Carlos (J.A. 312); Millbrae (J.A. 314); San Mateo (J.A. 374); Palo Alto (J.A. 313); Washington Township Industries (J.A. 328); and Redwood (J.A. 388).

[6] Stockton City Council (J.A. 79); Board of Supervisors, San Joaquin County (J.A. 81); Board of Supervisors, San Francisco (J.A. 209, 235); County of Sonoma (J.A. 231); County of Napa (J.A. 72); County of Solano (J.A. 233); City of San Jose (J.A. 238, 292); County of Marin (J.A. 238); County of Yolo (J.A. 244); County of Santa Cruz (J.A. 246, 302); County of Santa Clara (J.A. 304); Port of New York Authority (J.A. 43); County of Alameda (J.A. 41); City of Hayward (J.A. 89, 367).

[7/] Those received prior to or around the initial denial of American's motion on June 26, 1957 were from the following Congressmen:

> Congressman Shelley (J.A. 103-104, 277); Congressman Maillard (J.A. 211); Senator Kuchel (J.A. 213, 285, 319); Congressman Scudder (J.A. 215); Congressman Baldwin (J.A. 217); Senator Knowland (J.A. 223); Congressman Allen (J.A. 274); Congressman Moss (J.A. 280); Congressman Younger (J.A. 282); Congressman McFall (J.A. 307); Congressman Smith (J.A. 311); Congressman Teague (J.A. 312); Congressman Lipscomb (J.A. 353); Congressman Hillings (J.A. 359); Senator Ives (J.A. 288); Congressman Kean (J.A. 327); Senator Javits (J.A. 340); Congressman Ray (J.A. 346); Congressman Becker (J.A. 348); Congressman Canfield (J.A. 351); Congressman Gwinn (J.A. 355); Congressman Fino (J.A. 357); Congressman Latham (J.A. 363); Mrs. St. George (J.A. 365); Congressman Osmers (J.A. 367); Congressman Bosch (J.A. 372); Congressman Coudert (J.A. 374); Senators Case and Smith (J.A. 342).

2. The period June 27, 1957-January 13, 1958

This is the period intervening between the Board's denial of American's application for an expedited proceeding (J.A. 90) and the date of the Board's order (J.A. 97-98) assigning the nonstop matter for hearing. The activities for this period are set forth in certain portions of the examiner's report adopted by the Board (Tr. 10363-10374).

By letter to the Board dated July 3, 1957, Mayor Christopher had expressed concern over the Board's denial of American's motion (J.A. 379). That letter was returned by the Chairman to him with advice that this in effect was a petition for reconsideration which should be filed and served in accordance with the Board's rules (J.A. 378), and this was done. Thereafter, some 16 additional communications were received by the Board during this period (Tr. 10365), 14 of which were from Congressmen along the lines of those earlier received.[8/] Another was a routine referral note to the Board from Sherman Adams enclosing a communication from the Chairman of San Francisco Mayor's Committee with an appended "fact sheet," which latter document had been prepared jointly by personnel

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[8/] Congressman Younger (J.A. 389); Congressman Maillard (J.A. 386); Senator Knowland (J.A. 390); Senator Kuchel (J.A. 392); Congressman Shelley (J.A. 111, 112, 394); Congressman Gubser (J.A. 400); Congressman Teague (J.A. 402); Congressman Moss (J.A. 406); Congressman Allen (J.A. 408); Congressman Sheppard (J.A. 410); Congressman Baldwin (J.A. 404); and Senator Pastore (J.A. 377).

of American Airlines and the City Attorney's Office[9/] (J.A. 395-398). The other was from the Redwood Chamber of Commerce urging an expedited hearing on the nonstop question (J.A. 388). In all, this period accounted for about 44 more pages of the correspondence section of the dockets.

Also during this period, C. R. Smith, the president of American, spoke on November 4, 1957 to a luncheon group assembled in San Francisco by American composed of city officials, members of the press, and business leaders. He there mentioned American's plans to introduce jet aircraft on its Los Angeles-New York nonstop flights, and indicated that, unless its application was granted, San Francisco could expect Los Angeles to receive jet service in advance of that which would be provided to San Francisco (Tr. 10367-10369). At some point during or after this luncheon, Mr. Smith also appears to have stated that San Francisco should press its efforts for a hearing on the nonstop matter because "you have to keep hammering . . . if you want to get anywhere" (Tr. 10369).

There was a conference between the Board Members and San Francisco representatives held in Washington on December 2, 1957 (J.A. 973-986). The suggestion for holding such conference had been made by an American employee to a city official (Tr. 10290),

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[9/] This sheet also was transmitted to the Board by other sources (J.A. 408).

and, prior to the conference, the city temporarily transferred its Sacramento lobbyist to Washington for the purpose of interviewing the New York and California members of Congress who might be interested in the third carrier principle (Tr. 10370). One member of the San Francisco delegation had stated in a newspaper interview that the Board would have to be "pressured" if San Francisco were to obtain its goal (Tr. 10370). An examination of the public transcript of this conference (J.A. 975, 978) demonstrates that the delegation was rebuked for this statement, received a cool reception, and was restricted to a discussion of the city's air transportation needs.

On January 13, 1958, the Board by Order E-12103 (J.A. 97) directed that American's application for nonstop service be set down for expeditious hearing. Chairman Durfee and Member Denny dissented from this action (J.A. 99-100). After the Board announced its decision, officials of American congratulated San Francisco officials for their efforts, and, in turn, the San Francisco officials in press interviews attributed the favorable decision mainly to the efforts of the Senators, Congressmen, state political leaders, chambers of commerce, and civic associations (Tr. 10373).

3. The period January 14, 1958-March 9, 1959

This is the period between the Board's order setting the nonstop matter for hearing and the issuance of the examiner's initial decision. The activities are set forth at Tr. 10374 to Tr. 10388 of the portions of the examiner's report adopted by the Board.

During this period, American issued three press releases or memoranda to editors (Tr. 9032, 9034, 9062; 10377-10378). It continued to cooperate with the city officials. An official of American also wrote a letter to an influential citizen of San Francisco criticizing the Board for delays which were said to have occurred in the case (Tr. 8978-8979; 10385). Also, on the general question of delay, the Board's hearing examiner had initially scheduled public hearings to begin on July 8, 1958, and it was necessary that this date be postponed until July 30, 1958. Mayor Christopher addressed a telegram to the Board expressing concern over this delay (J.A. 114), and copies were sent to the California congressional delegation. Some of them requested explanations from the Board (J.A. 114, 123, 125), and there was editorial criticism in the San Francisco press with respect to this matter to which American may have contributed (Tr. 8988-8989; 10381-10382). In all, this period accounted for about 30 more pages of the approximate remaining 100 pages in the public correspondence file (Tr. 10375-10376). Twelve communications from members of Congress were included, and one of them enclosed a communication from a travel agent.[10]

4. The period March 10, 1959-September 2, 1959

This is the period between the examiner's initial decision recommending nonstop authority to American and the Board's Order E-14412 (Tr. 10320) making that award. The activities are summarized at Tr. 10388 to Tr. 10397 of the portions of the examiner's report adopted by the Board.

For the most part, the activities of American and San Francisco during this period were directed to soliciting congressional support before the Board pursuant to its Rule 14 (which then permitted Congressmen to appear in argument or file supporting statements). One press release was issued by American during this period (Tr. 9069), and American apprised members of Congress from California and New York of oral argument before the Board in the hope that such members would appear or submit written statements. American sales representatives also requested some of their accounts (including travel agents) to write their Congressmen to appear and support the carrier. There were some 20 communications received by the Board during this period, which are again summarized in the examiner's report (Tr. 10390-10391). These included communications from Congressmen asking that their statements be received under Rule 14, congressional transmittals to the Board of statements from travel agents requesting the members of Congress to support American,[11] and copies of a resolution from the California legislature favoring a third New York-San Francisco nonstop service.[12]

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[10] These communications are summarized in the examiner's report (Tr. 10375-10376). They were from the following individuals, and dealt principally with a desire that the proceeding be expedited:

> Congressman Shelley (J.A. 111, 112); Senator Knowland (J.A. 115); Congressman Maillard (J.A. 122); Congressman Clem Miller (J.A. 132); Congressman Younger (J.A. 134); Congressman Johnson (J.A. 135); Congressman Cohelan (J.A. 137); Congressman George Miller (J.A. 140); Senator Engle (J.A. 136); Senator Kuchel (J.A. 125); and Senator Case enclosed one from a travel agency (Ronna Travel Agency) (J.A. 141).

In addition to the so-called "Rule 14" letters and statements, 16 members of the Congress personally appeared at the argument or had statements read into the record on their behalf (Tr. 10388-10389).

B. The Board's findings

1. The findings of violation

The Board's Rules of Practice in force during the course of its proceeding included Rule 14 (*infra*, p. 55), which permitted any person to appear and present evidence in a proceeding and thereafter to file written statements conforming to the requirements for briefs. Additionally, representatives of either the federal or a state government could appear and present oral argument to the Board. Sections 401(c) and (g) of the Act (infra, pp. 41-43) provide that, with respect to new certificate applications or applications for amendment of existing ones, "any interested person may file with the Board a protest or memorandum" in opposition or support. The Board's Principles of Practice (infra, pp. 45-47, i.e., its "Code of Ethics" in relation to practice before it) generally called for observance of judicial standards, precluded private communications to the Board or its staff "on the merits" in cases required to be decided on a record, and specified that it was improper for persons interested in such cases "to bring pressure or influence to bear upon the members of the Board or its staff."

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[11] Senator Engle (J.A. 155); Senator Kuchel (J.A. 158); Congressman Moss (J.A. 160); Mrs. St. George (J.A. 163); Congressman O'Brien (J.A. 165); Congressman Osmers (J.A. 168); Congressman Anfuso (J.A. 173); Senators Javits and Keating (J.A. 176); Congressman Sisk (J.A. 185); Congressman Celler (Tr. 4490); Congressman Bosch (Tr. 4488); and Congressman Healey (Tr. 4491).

[12] This same resolution was forwarded without comment to the Board from the White House (J.A. 180-182).

The Board found that its Rules of Practice (as distinguished from its Principles of Practice) had not been violated by American or San Francisco in that such rules had no application to "informal communications to the Board by nonparties which have no standing as a part of the record and are not considered by the Board in the adjudicatory process" (Tr. 10281-10282).[13] The Board found, however, that there had been violations of its Principles of Practice by American and San Francisco "each individually and on its own" (Tr. 10296), and that San Francisco's improper activities were not imputable to American except that both shared responsibility for the actions leading to the conference with the Board of December 2, 1957 (Tr. 10296-10297). The Board interpreted its "Principles" as applying not only to the merits of a case set down for hearing but also to an application pending before the Board and to efforts to obtain an expedited hearing thereon (Tr. 10285, 10289; see, also, J.A. 951 where the Board had so interpreted them in its prior order on reconsideration in this case).

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[13] TWA had argued that any communication not specifically provided for in the Board's Rules of Practice was necessarily in violation of such rules. The Board disagreed (Tr. 10281), stating that the statute (Sections 401(c) and (g)) permitted third persons

(footnote continued)

Under this view, the Board held (Tr. 10291) that American and San Francisco had conducted campaigns intended to generate "extra-record influence and pressures on the Board," and so had violated Section 2(c) of the Principles of Practice (infra, p.46).[14] While the bulk of these activities were in relation to the motion to expedite, the Board found some continuation of them after the matter had been set for hearing. As to American (Tr. 10288), these

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to file documents with the Board in certificate cases, and that it had not implemented these provisions beyond specifying in Rule 14 the types of communications which would comprise a part of the record. The so-called "Rule 14" communications were found to conform to the requirements of that rule as interpreted and applied by the Board, and the Board found no impropriety in the solicitation of congressional appearances pursuant to Rule 14 (Tr. 10293).

[14] The Board also found that San Francisco had addressed ex parte communications to the Board, but that American had not (Tr. 10294).

> "activities after the case was activated consisted in some continuation of its press activities . . . ; in at least three contacts with travel agents, which do not appear to have been clearly restricted to the then wholly proper action of soliciting support for Congressional appearances at oral argument; and in at least one Congressional contact which was evidently not limited to solicitation for oral argument."

The mentioned press activities appear to have consisted of the issuance of four press releases by American after activation of the proceeding (Tr. 10300), and a luncheon of June 25, 1958 for newspaper officials (Tr. 10367-10369). As the Board noted (Tr. 10300), "the preponderance of American's press activities took place prior to the time the case was set down for hearing and sharply diminished thereafter."

2. The findings of the effect to be given to the violations

The Board pointed out that "there is here no evidence or allegation of venality; no personal misconduct of a Member or the staff; no conscious bias; no wrongdoing on the part of third persons; no covert approaches or clandestine meetings between any party and any staff member, Examiner, or Board Member and no corrupt tampering of the adjudicatory process of a type condemned by the courts" (Tr. 10302). Accordingly, it concluded that there was no basis for vitiating its proceeding on grounds that the petitioners had been denied a fair hearing. On the contrary, the Board noted (Tr. 10303) that this Court had heretofore affirmed the Board's award in terms of substantial evidence; that the Board had previously rejected the suggestion that the activities might conceivably have affected some Member's decision; that the communications involved were of the type ordinarily not seen by the Board Members; that most of them were addressed to the then Chairman; and that their lack of influence was self-evident by his action in dissenting from the award to American. Likewise, the Board found that vitiation of the proceeding was not required "to vindicate the Board's processes" and to discourage future improper activities (Tr. 10306). Rather, said the Board, it had now corrected the deficiencies in its Rules and Principles of Practice heretofore noted in its earlier order finding that the award should not be set aside (J.A. 944), and that these amended rules represented "the appropriate vehicle for deterring the recurrence of any similar problems" (Tr. 10306).[15]

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[15] The amendments adopted by the Board and set forth (_infra_, pp. 47-54, 58-62) involve modification of Section 300.2 of its Principles of Practice and Section 302.14 of its Rules of Practice in Economic Proceedings. The amendments make it clear that the Board's Principles are applicable to all applications or petitions which can only be granted after notice and hearing from the date of their filing. Written or oral _ex parte_ communications to the Board or its staff on any substantive or procedural issue are prohibited and, if made, are placed in the correspondence file of the case, made available for public inspection, and disregarded for all purposes by the Board and its staff (300.2(a)). All requests for expedition of pending applications are defined to be communications on the merits and must be made by motion by a party or if not a party the correspondence must be served on all the parties consistently with Rule 302.14 (300.2(b)). Furthermore, it is made improper to solicit communications to the Board other than those authorized by its Rule 302.14 and Rule 302.15, and any party soliciting such communications must call the attention of the person whose support they seek to the rules (300.2(e)). By deleting subsection (c) of Rule 302.14, it has been so amended as to exclude Congressmen from appearing before the Board at oral argument. However, the Board stated in connection with its action that it did so because the appearances of Congressmen at oral argument are in its opinion unnecessary because under Rule 14, Congressmen can still appear before the examiner or submit written statements to him before the record is closed (302.14(b)).

Similarly, the Board found that the violations did not disqualify American from receiving the award, either on an absolute or comparative basis (Tr. 10306, 10308, 10309-10310). The Board found, as previously noted, that the bulk of the violations had occurred in relation to the efforts to obtain an expedited hearing on the nonstop question and prior to the activation of its proceeding. While concluding that its Principles of Practice were applicable at this phase of the proceeding, the Board also found that this point was not so clear as to make unreasonable American's assumption that the principles applied only to matters set down for hearing (Tr. 10305, 10307-10308). The Board also noted that the extent to which persons could provide information to the press was by no means clear (Tr. 10299). It found that American had diminished its activities after the activation of the case, and that while some of its subsequent activities were objectionable, "they were essentially of a minor nature and none of them, including the press efforts, represented either an extensive or intensive effort to sway the Board's judgment" (Tr. 10299).

On the matter of comparative consideration, the Board noted that it did not deem itself to be required under the Court's mandate to set aside the award to American and to re-evaluate the comparative qualifications of American and Northwest (Tr. 10307). The Board went on to find, however, that further proceedings looking toward comparative reevaluation would serve no useful purpose since American's violations were not sufficiently weighty to require Northwest's selection over American in the light of the public interest criteria applicable to route awards. American already was operating between New York and San Francisco, and the selection of Northwest would have placed a fourth carrier in these markets in circumstances in which the public convenience and necessity did not require that result (Tr. 10307-10308).[16]

Member Gillilland concurred (Tr. 10311-10315) in the Board's findings, agreeing that American's activities had not been such as to warrant a setting aside of the award. He added his doubt of whether "disqualification is a proper penalty" to impose for nonconformity to procedural regulations in the light of the public interest considerations relating to the certification of air routes, and suggested that a more appropriate method of dealing with such violations might be statutory penalties directly applicable to the individuals who violate the rules.

STATUTES AND REGULATIONS INVOLVED

The provisions of the Federal Aviation Act and the Board regulations principally involved are set forth in the appendices, *infra*, pp. 41 to 62. Other such provisions are cited or quoted at their appropriate place in the text of this brief.

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[16] The Department of Justice did not contend before the Board that American was disqualified but rather that American should be assessed a comparative demerit for any violations found to have occurred. See the Department's brief which TWA has caused to be printed in the Joint Appendix (Tr. 10075-10081). The Board in effect compared American and Northwest in the light of American's violations, and thus in substance took the action which the Department had suggested.

SUMMARY OF ARGUMENT

I

The Board found that the activities of American and San Francisco violated its Principles of Practice, which in general prohibit pressure tactics and ex parte communications designed to influence it or sway its judgment. While TWA asserts that the Board likewise should have found that these activities resulted in violations of the Rules of Practice, the contention is of no significance since the real question is whether the conduct involved was of such nature as to require a vitiation of the proceeding or disqualification of American. Nonetheless, the Board correctly found that its rules of practice were not violated. While such rules do not expressly authorize the communications here received from third persons, the Board correctly pointed out that they are authorized by Sections 401(c) and (g) of the Federal Aviation Act, and that its rules of practice extended only to matters received for the record. Here, the communications were not so received, and the Board was not required to characterize the persons who sent them as being in violation of its rules.

Similarly, the Board did not err in failing to impute all of San Francisco's activities to American. The record discloses that San Francisco aggressively sought to obtain a third nonstop carrier in its own way, and cooperated with American only because such cooperation served the city's purposes. American obviously could not control or dictate the activities of the San Francisco and other public officials, or the press. In these circumstances, the Board properly found that only the December 2, 1957 conference which American suggested San Francisco should hold with the Board was imputable to American.

II

There is no basis for vitiating the Board's proceeding on grounds that petitioners were deprived of a fair hearing. The record is free of any suggestion of venality or corruption on the part of anyone, or of any corrupt tampering with the administrative process. The Board pointed out that the communications to it were the kind commonly received in route proceedings, that congressional support for increased air services to constituents was the normal assumption, and that the communications did not affect its decision. Indeed, petitioners rely primarily on the possibility of unconscious influence. But as pointed out in Shaugnessey v. Accardi, 349 U.S. 280, 283 (1955), assertions of unconscious influence are purely speculative and of no legal moment.

Similarly, vitiation is not required to vindicate the integrity of the administrative process. This case is unlike the ones involving the Federal Communications Commission where there was either corrupt tampering with the administrative process or personal approaches to the Commissioners. The Board's determination that clarification of its rules, rather than a setting aside of the route award to American, would best vindicate the administrative process was proper.

III

We submit that the Board properly found that American's conduct did not justify disqualifying the carrier, either absolutely or on a comparative basis. There were various ambiguities in the Board's rules, and there is considerable divergence in opinion as to the time and extent to which communications may be directed to administrative agencies. The bulk of the activity here involved was in relation to American's motion to expedite the hearing, and American's view was not unreasonable that the Principles of Practice had no application at that time. The activities were sharply diminished after the case had been activated, and were minor in nature. In these circumstances, disqualification of the carrier was not required.

Neither did the violations require the selection of Northwest over American. American already had one-stop authority which could not be terminated, and the public convenience and necessity required only three operations. Granting Northwest's application, therefore, would put four carriers in a market which only required three. Neither this result nor the alternative of denying the public the benefit of a third nonstop service would be appropriate in the circumstances here presented.

ARGUMENT

Introduction

The petitioners, and particularly TWA, attempt to portray a conspiracy between American and San Francisco pursuant to which these parties manipulated persons of national prominence and the press to bring pressure and influence to bear upon the Board to force a decision favorable to American, and an unwarranted condonation by the Board of this conspiracy. Despite their efforts, however, they are forced to concede that no Board or staff member was consciously biased; that there was no venality or corruption on the part of anyone; that there was no conscious impropriety on the part of any third person involved; and that there was no corrupt tampering with the Board's adjudicatory process (Tr. 7593-7597; 10302). True, there were violations by American and San Francisco, but, as we show, these were not condoned in the sense in which the petitioners contend. Rather, the situation was one in which the Board found that the violations were not of such character as to warrant a vitiation of its proceeding or a disqualification of American. We subsequently show that the Board correctly determined the character of the conduct involved, and correctly concluded that it did not warrant a setting aside of its order.

I. The Board's findings as to the violations which occurred are supported by the record

TWA asserts that the Board erred (1) in not finding violations of its Rules of Practice as well as its Principles of Practice; (2) in not finding American to be responsible for San Francisco's violations; and (3) in not finding more improper conduct than it did.

As to the Rules of Practice, the contention, as noted by the Board (Tr. 10280), appears to be that since the communications from third persons did not fall within the scope of the Board's rules, they must necessarily have been in violation of those rules.[17] But as the Board also pointed out (Tr. 10281), Sections 401(c) and (g) of the statute (infra, pp. 41, 42) confer a right in interested persons to file communications with the Board, and it can hardly be said that the exercise of this right constitutes a violation. Moreover, whether the Board should have promulgated rules governing these submissions, or for that matter, whether its finding of no violation of the Rules of Practice is in error, is of no real moment here. The question is whether the conduct of American and San Francisco was such as to require a setting aside of the Board's order and not how many technical violations may have occurred.

With respect to the contention that American should have been charged with the violations of San Francisco and all the communications concerning the case, TWA again would have the Court believe that San Francisco would not have aggressively pursued the question of a third nonstop operation but for the prodding and urging of American, and that there would have been no public interest evidenced in the nonstop matter but for American's actions. But the record shows that San Francisco was no mere pawn in this matter. It afforded a hearing to American, United, and TWA before determining to support American (Tr. 10337), and after that determination was made, pursued its own course. That was the direct testimony of the Chairman of the San Francisco Public Utilities Commission (Tr. 7381, 7386, 7388, 7432). Not only is there no reason for not crediting the testimony, but it is borne out by other testimony.[18] True, San Francisco availed itself of American's services on occasion and cooperated with American in its activities both on and off the record. But cooperation is the normal situation where civic and air carrier interests coincide.[19]

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[17] TWA asserts not only a violation of Rule 14 in this respect (Br., p. 17), but also (p. 28) violations of Rules 24(j), 26 and 31 (infra, p. 57). These latter assertions of violation appear to also rest on the erroneous view that the Board accepted the letters as a part of the record or as briefs or proposed findings.

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[18] Thus, Mayor Christopher of San Francisco stated that he was not at all interested in American Airlines. All he and the city wanted was a third nonstop carrier (Tr. 7474). These statements are reiterations of what two other San Francisco officials said was their purpose in supporting American's motion to expedite. Chairman Martin of the San Francisco Public Utilities Commission (Tr. 7381) and Member of the Board of Supervisors, McCarthy (Tr. 7266). One of the city's delegates to the December 2, 1957 conference before the Board testified that all he wanted was a third nonstop carrier for the city, and that he was not interested in American Airlines (Tr. 7239).

[19] Mr. Shipley, a vice-president of American, testified that it is the common practice among airlines in route cases to work with the communities involved, furnish them data, and assist them if requested to do so in the preparation of their briefs and pleadings (Tr. 6435). See, also, the testimony of Mr. Martin to the same effect (Tr. 7388).

It is manifest from the viewpoint of common sense that American was not in any position to dictate to or control the officials of the City of San Francisco or those of its civic associations, chamber of commerce, nor the city's representatives in Congress and the state legislature. Similarly, there is no scintilla of proof in this record at all that American (or the City of San Francisco, for that matter) could dictate to the San Francisco newspapers what editorials they would write or news items they would publish. The short of the matter is that San Francisco's officials and representatives are aggressive individuals who seek the maximum in air services to their community and who may be expected to cooperate with any person whose proposals are in furtherance of that goal. As Mayor Christopher stated (Tr. 7490):

> "It is my policy as the Mayor of San Francisco to do all I can to further the interest of my city. Whether it is getting a baseball team or getting a new airline route or whatever it is we are seeking, we seek the support of our surrounding Congressmen and public officials." 20/

While petitioners generally suggest that the Board should have found more improper conduct than it did, the specific complaint in this area seems to be that a finding should have been made that American misled members of Congress into offering their support

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20/ We also observe that the contentions that American should be charged with San Francisco's violations, as in the case of the claim that violation of the rules of practice should have been found, appear to be largely in the nature of attempts to increase the number of violations chargeable to American. But again the issue is not how many violations occurred but whether the type of conduct involved had vitiating or disqualifying effect.

for American's application (TWA Br., p. 21). The Board's Rule 14, as interpreted and applied by it, permitted the appearance of members of Congress at argument or the filing of so-called Rule 14 statements with the Board. Moreover, consistently with the principle that parties are entitled to solicit support on the record from whom they will, it has heretofore been held that there is no impropriety in soliciting such congressional appearances. Eastern Air Lines v. Civil Aeronautics Board, 271 F. 2d 752, 760 (C.A. 2, 1959). And that being so, we see no impropriety in American's having solicited others to urge Congressmen to appear. There is no showing that any Congressman in fact was misled by American. Members of Congress need little or no urging to support new air services for their constituents.

II. The Board's rules were not so violated as to require that the Board's proceeding be vitiated to insure a fair hearing to the petitioners or to vindicate the administrative process

Petitioners assert that the Board's proceeding should be vitiated, i.e., a "mistrial" should be declared and the case heard afresh, to insure a fair hearing to them and to vindicate the administrative process. While conceding that the record is free from any suggestion of venality, corruption, or conscious bias on the part of the Board or any public official, their claim is that there is no way of determining the effect which American's and San Francisco's activities may have had upon the Board, and, in any event, that the content of the Board's correspondence file and the appearances of Congressmen before it have created such a public appearance of improper influence as to require the Board's order to be set aside to preserve and restore public confidence in the administrative process. These allegations are identical to the ones heretofore advanced to the Court by the petitioners in the earlier stages of this case, and, as previously noted, the Board's reopened proceeding revealed no communications to or "pressures" on the Board different from the ones then alleged. The Court, we think, then rejected the claims that these communications vitiated the Board's proceeding, and, in any event, it should reject them now.

As to the contentions of unfair hearing, the Board which decided the case specifically rejected the suggestion that its action had been influenced by the matters relied upon by petitioners (J.A. 963), and the present Board found nothing in the instant record which would permit any other conclusion (Tr. 10302-10303). Administrative disclaimers of consideration of matters outside the record are accepted by the courts in the absence of strong evidence to the contrary, and any other result would make the functioning of the agencies virtually impossible since by their very nature they may be aware of numerous nonrecord matters which may relate to the matter at hand.[21/]

Furthermore, while TWA seems now to charge the Board with having responded to pressure (see its disclaimer on this point before the

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[21/] Sanders Bros. Radio Station v. Federal Communications Commission, 70 U.S. App. D.C. 297, 106 F. 2d 321, 327 (1937), affirmed on this point 309 U.S. 470, 478; N.L.R.B. v. Ford Motor Co., 118 F. 2d 766 (C.A. 9, 1941). See, also, Federal Trade Commission v. Cement Institute, 333 U.S. 683, 700-701 (1948); United States v. Morgan, 313 U.S. 409, 420-421 (1941).

Board, unprinted Tr. 10025, 10031-10032), this claim rests merely on TWA's assertion, and its principal contention seems to be that the Board may have been unconsciously influenced. But as the Supreme Court held in relation to a claim that the Board of Immigration Appeals had been unconsciously influenced against a deportee because of the Attorney General's view that he should be deported, "we do not believe that speculation on the effect of subconscious psychological pressures provides sufficient justification for rejecting the District Court's finding" to the contrary. Shaugnessey v. Accardi, 349 U.S. 280, 283 (1955). And while TWA asserts that the communications in the correspondence file deprived it of the right to respond to them, the short answer is that they were not considered by the Board, and hence there was no need for rebuttal.[22]

Finally on the point of unfair hearing, there is nothing about this case which supports any inference that the Board was influenced, consciously or unconsciously. As the Board found in its prior order rejecting the claim that its judgment might have been affected, the receipt of communications from public officials is "merely corroborative of the Board's normal assumption in any route case that all public officials will favor new or additional air service" (J.A. 964).[23] Also, as was here found (Tr. 10303), the bulk of the communications were of the type ordinarily not seen by the Board Members, were addressed to the Board's Chairman, and he dissented both from the Board's order setting down the American application for expeditious hearing (J.A. 99) and from the Board's award of nonstop authority to American (J.A. 808).[24]

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[22] Again, as we pointed out in our earlier brief (p. 25), the thrust of the petitioner's argument on this score is that the Board must change its practice of placing third party communications in the public record for all to see and according no weight to them, to one of affording parties an opportunity to respond to all matters received by the agency. As there stated, an acceptance of this view would mean that the Board would lose control of its proceedings since, upon receipt of a letter, all parties would have to be afforded time in which to be served and to answer, with all such materials (pro and con) then being considered by the Board.

Petitioners also seek to portray a situation in which vitiation is required to vindicate and restore confidence in the administrative process. But the facts upon which they rely are not such as to warrant that action, and their attempted characterization of the instant case as one which has shaken public confidence in the fairness and impartiality of the agencies is merely their own depicting. Indeed, Professor Gelhorn, an informed and disinterested observer of the administrative process, has expressed the view that nothing "could be more natural" than for public officials to express their views to the Board in cases of this type, and that the communications in this case "seem thoroughly understandable without imputing to the opinion--expressers a desire somehow or other to subvert the processes of justice." Gelhorn,

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23/ The Board's examiner found that the materials in question did not differ from those found in the files of any large route proceeding before the Board (Tr. 10468).

24/ TWA asserts in its brief (pp. 25, 26) that it may have been prejudiced since the Board might have declined to expedite the nonstop proceeding and also might have denied the application. This Court has heretofore affirmed the Board's award on findings that the action was supported by substantial evidence, and, likewise, has rejected the petitioners' claims that they were prejudiced because American's application was accelerated for hearing.

"Administrative Procedure Reform, Hardy Perennial," 48 A.B.A. Journal 243, 244 (March, 1962).[25/]

In sum, and despite the petitioners' efforts to so depict it, this case is not like the Federal Communications Commission cases on which the petitioners rely. There is no showing of "corrupt tampering with the adjudicatory process itself" but rather only one of somewhat "unclean hands" on the part of American and San Francisco. WKAT, Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___, 296 F. 2d 375, 383 (1961). Further, even in the FCC cases, the holdings were not that the proceedings were vitiated in the sense of having been a mistrial, but rather that the conduct involved was disqualifying to the guilty applicant.[26/] While the Court did direct a new hearing in Sangamon Valley Television Corp. v. United States, ___ U.S. App. D.C. ___, 294 F. 2d 742 (1961), that action rested on the finding that "[i]n all the circumstances we think it would not be appropriate for the Commission to determine in 1961 on the basis of a somewhat supplemented 1957 record where and to whom VHF Channel 2 ought to be assigned." Thus, the remand appears to have rested on the view that the record was stale with respect to economic factors material to the Commission's decision. There is no such problem in this case,

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[25/] See, also, Dean Landis' "Report on Regulatory Agencies to the President-Elect," Dec., 1960, pp. 15, 43.

[26/] In the Channel 5 and 10 cases, Judge Stern held that the awards were "voidable" rather than "void," and the FCC agreed. In re Application of WHDH, Inc., et al., 29 F.C.C. 204, 211 (1960); In re Application of WKAT, Inc., et al., 29 F.C.C. 216, 217 (1960). This Court in its WKAT decision after remand to the Commission approved the re-grant of the permit to another party in the same proceeding.

since the Court has previously upheld the Board's order against the petitioners' challenge that more recent public convenience and necessity evidence should have been considered. Further, to the extent that the decision in Sangamon may have been influenced by the conduct involved, the answer is that the conduct here was different.[27/] Similarly, the decision in Massachusetts Bay Telecasters, Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___, 295 F. 2d

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[27/] In Sangamon the Commission found that the principal "offender," one Tenenbaum, prior to the institution of rule-making proceedings for intermixture of television channels at Springfield, Ill., visited the offices of individual Commissioners and in private interviews urged them to institute such proceedings with a view to transferring his UHF Channel 36 to Springfield and VHF Channel 2 to St. Louis, and granting him temporary authorization to operate Channel 2 if the transfer was consummated; that in the course of such interviews he presented information regarding the alleged deteriorating UHF situation in St. Louis, his station's losses and other factual material and arguments bearing on the issues involved; that in the same period he wrote letters to the Commissioners on the same subjects, and sent each of them a brochure regarding the operation of the St. Louis UHF Channel by his company; that after the notice of proposed rule making was issued and while the question of the transfer of Channel 2 to St. Louis and the transfer of Channel 36 to Springfield was under consideration, he argued for prompt action on the transfer in numerous office visits and private interviews; that on one visit in this period he left the Commissioners a copy of an engineering study pointing out the advantages of changing Channel 36 to Springfield; that he gave each Commissioner a Thanksgiving turkey in appreciation of their courtesy to him; that he conferred with several Senators regarding a report of the Magnuson Committee relative to giving deleted UHF Channel licensees new VHF Channel licenses added to their communities; that after the time for filing comments had expired he left with each Commissioner a legal memorandum showing the temporary licensing of his company to operate Channel 2, if moved, was legal and necessary in the public interest; and that "Tenenbaum's off-the-record presentations to Commissioners were not revealed or known to other parties in interest, and whatever information, comments, or arguments he may have presented to the Commissioners in private interviews and personal letters did not admit, therefore, of any analysis, reply comments, or criticism by other interested parties." Report and Recommendation, February 15, 1961; Initial Decision of Hearing Examiner Stern, March 11, 1960.

131 (1961) involved facts and considerations different from those here present, and is of no assistance to the petitioners.[28]

All this is not to say that American and San Francisco were justified in their activities, nor does it constitute a condoning of them. Rather, the point now being made is that nothing occurred which warrants a vitiation of the Board's proceeding. As we subsequently show, there were substantial doubts and uncertainties as to the application of the Board's Principles of Practice and the circumstances in which comment could be addressed to an agency. The Board has clarified these matters with respect to its proceedings in the revision of its rules resulting from this case, and the Board's conclusion was that such clarification and future application of the revised rules represented the more appropriate vehicle for deterring the recurrence of future such conduct than a setting aside of the route award to American. This conclusion is a reasonable one, and should be permitted to stand.

III. The Board's rules were not so violated as to disqualify American, either absolutely or on a comparative basis, from receiving the nonstop authorization

As previously noted, the great majority of the communications received by the Board were prior to the setting of the nonstop case for hearing, and there was a sharp diminution of activity by American thereafter. The record shows that the American and other officials involved were of the opinion that their activities occurring prior to the time that this case was set for hearing were permissible under the Board's rules and as a matter of ethics.[29] To be sure, the Board construed its rules differently, and held them applicable to an application prior to its being assigned for hearing, and to the procedural point of expedition. The Board likewise held, however, that this matter was not so clear as to render unreasonable the parties' different views on the point, and consequently concluded that the violations were not so serious as to warrant the disqualification of American (Tr. 10307-10308).

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[28] In that case, the Court affirmed the Commission's determination to set aside its award and to hold further hearings, a matter resting within the Commission's discretion under the WOKO principle. Further, that case involved personal contacts with the Commission's chairman. See In re Applications of WHDH, Inc., et al., 29 F.C.C. 204 (1960).

The petitioners now allege that there was no reasonable basis for the Board's conclusions in this respect, and that the Board's then Principles of Practice clearly were applicable and plainly proscribed the conduct involved. However, it is perfectly obvious that neither the Board's then existing regulations (infra, pp. 45-47, 55) nor existing ethical concepts possessed the degree of clarity urged by the petitioners. The Board's regulations did not define when a "proceeding" should be considered in being for purposes of the Principles of Practice, what constituted a communication on the "merits" as distinguished from a nonprohibited one on procedure, or what constituted a private communication. There were no provisions governing the manner of solicitation of participation by third persons, and the Board's rules did permit appearances by members of Congress and other public officials. Further, again as the Board said (Tr. 10299), the extent to which statements may be made to the press is not clear.

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[29] Thus, officials of American testified they had been directly advised by counsel that communications to the Board concerning American's motion to expedite did not violate the Board's rules (Tr. 5680-5681). They also indicated that in their opinion there was no proceeding pending in 1957, there were no formal parties of record, and that a communication relative to a procedural motion to expedite was not one on the merits (Tr. 5679, 6135-6136). In this opinion, they were joined by Chairman Martin of the San Francisco PUC (Tr. 7387) and Chairman Miller of the Transportation Committee of the San Francisco Chamber of Commerce (Tr. 7315-7317). Officials of American further testified that they were also advised it was proper under the Board's regulations for them to solicit the support of Congressmen to appear at oral argument or to write statements in lieu of appearing at oral argument (Tr. 5613, 5614, 5680).

Moreover, these matters have been the subject of numerous inquiries and discussions in legal and congressional circles with varying views as to what should be appropriate standards. As the Board pointed out here (Tr. 10301), Dean Landis in his December, 1960 "Report on Regulatory Agencies to the President-Elect," stated that (p. 43):

> "No objection could rightly be made to *ex parte* presentations at the informal stages, presentations that relate to the need or desirability of new air services. Only at the hearing stage where a choice has to be made as between competing applicants do *ex parte* presentations become truly harmful."

He also pointed out (p. 69) that the over-all problem "is not easy." See, in this connection, the Celler "Report on Federal Conflict of Interest Legislation,"[30] where it is recommended that the ban on ex parte communications be applied to a contested proceeding "which has been designated for hearing." In like vein, as the Board noted (Tr. 10301), the current bills against ex parte communications apply the ban only after the proceeding has been noticed for hearing unless the agency provides that it earlier apply.[31] And on the general subject matter, see the Hearings on H.R. 14 before the Committee on Interstate and Foreign Commerce of the House of Representatives, 87th Cong., 1st Sess. (1961); and the Committee Report (H. Rep. 2070, p. 11, 86th Cong., 2d Sess.).[32]

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[30] *Staff Report to the Antitrust Subcommittee of the House Committee on the Judiciary*, 85th Cong., 2d Sess., December 30, 1958 (p. 69).

In sum, what is asserted to have been crystal clear to these petitioners was by no means so clear to anyone else. Certainly, the Board's view was well founded that there were sufficient ambiguities and uncertainties to mitigate American's conduct prior to the setting of the case down for hearing. As previously noted, the record supports the Board's determination that American's activities after that time sharply diminished and did not represent "either an extensive or intensive effort to sway the Board's judgment" (Tr. 10299). The question of the extent to which violations shall be deemed disqualifying is committed largely to the discretion of the agency

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[31] The Board referred to H.R. 12731, 86th Cong., 2d Sess. The principal current bill is H.R. 14, 87th Cong., 1st Sess., similarly providing.

[32] The mentioned hearings reflect, as do all discussions on the subject, the varying views with respect to what communications are proper to agencies and when they may be made. The one point on which there is agreement is that there should not be "back door" approaches and clandestine attempts to influence the decisions of the regulatory agencies. Here there were no such attempts.

(Federal Communications Commission v. WOKO, 329 U.S. 223, 229 (1946)), and we submit that the Board did not abuse its discretion here. What these petitioners are really contending is that the Board should have clarified its regulations and at the same time should have imposed the maximum penalty applicable for their violation before clarification.

Likewise, we submit that the Board's determination was allowable that the violations found did not require the selection of Northwest over American for the nonstop award. American already had one-stop authority between New York and San Francisco. That authority obviously could not have been terminated because of the violations here involved, and the public convenience and necessity required a third nonstop operation. Granting the award to Northwest would have placed that carrier in San Francisco for the first time and would have resulted in a situation in which there would have been four operators between these cities. Neither this result nor the alternative one contended for by the petitioners of denying the traveling public the benefit of a third nonstop service would have been appropriate in the circumstances here presented, and indeed would have constituted an infliction of a penalty on the public.

CONCLUSION

On the basis of the foregoing considerations, the Court should affirm the Board's conclusion that its rules were not so violated as to require a setting aside of the award of nonstop authority to American, and should enter its judgment affirming that award.

Respectfully submitted,

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Dated: May, 1962

APPENDIX A

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 et seq., are:

* * * * * * *

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Sec. 401. [72 Stat. 754, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

Terms and Conditions of Certificate

(e) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

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Authority to Modify, Suspend, or Revoke

(g) The Board upon petition or complaint or upon its own initiative after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

* * * * * * *

EVIDENCE

Power to Take Evidence

Sec. 1004. [72 Stat. 792, 49 U.S.C. 1484] (a) Any member or examiner of the Board, when duly designated by the Board for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Board. In all cases heard by an examiner or a single member the Board shall hear or receive argument on request of either party.

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APPENDIX B

The Principles of Practice of the Civil Aeronautics Board (14 C.F.R. 300 et seq.) in effect at the time the Board issued its final order in this case read as follows:

300.0 APPLICABILITY OF PART.

The principles of practice set out herein to the extent applicable shall govern the relationships between the Board, its staff, and all others persons.

300.1 JUDICIAL STANDARDS OF PRACTICE.

In many respects the functions of the Board are similar to those of a court and parties to cases before it and those who represent such parties are expected to conduct themselves with honor and dignity. By the same token, the members of the Board, and those of its employees who participate with the Board Members in the determination of cases upon a record, are expected to conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff. The standing and effectiveness of the Board are in direct relation to its observance, that of its staff, and the parties and attorneys appearing before it, of the highest standards of judicial and professional ethics.

300.2 HEARING CASES - IMPROPER INFLUENCE.

It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases—

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

(b) It is likewise improper that there be any private communication on the merits of the case to a member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

300.3 CONCISENESS OF PRESENTATION.

Persons practicing before the Board should endeavor to present their cases in concise form avoiding cumulative and repetitious evidence, since the members of the Board participating in the decision of a case, after notice and hearing and upon a record, must familiarize themselves with the evidence in the record and with the arguments made on behalf of the parties orally and in written briefs, and must base their decision solely on the record.

300.4 UNUSUAL HOSPITALITY.

It is particularly improper that persons interested in the business of the Board should provide unusual hospitality to the Board or its staff; nor should such hospitality be accepted.

300.5 ATTORNEY-CLIENT RELATIONSHIP.

Persons practicing or appearing before the Board, whether or not members of the bar, should have due regard for the standards of professional conduct applicable to the lawyer-client relationship and to the relationship between a lawyer and a judicial tribunal.

(a) The nontechnical nature of the Board's procedure calls for special adherence, by practitioners to scrupulous standards of fairness, candor, and consideration for the rights of others in the pleadings filed, evidence submitted, conduct of the hearing, and briefs and arguments made. In appearing for a client, the practitioner thereby vouches on his honor that in his opinion the client's cause is one proper for determination, and in presenting pleadings and offering evidence he represents that the same are not offered for unwarranted delay and that in his opinion the content thereof is not misleading. Nor should he indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations.

(b) A practitioner, moreover, should advise his client to observe the law according to his conscientious belief as to its permissible meaning and should use his best efforts to restrain his client from improprieties in dealing with the Board or its staff. If a client persists in such improprieties, the practitioner should terminate their relationship.

300.6 VIOLATIONS.

The Board may disqualify and deny temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found after hearing by the Board to have engaged in unethical or improper professional conduct. Violation of any of the foregoing principles shall be deemed to be such conduct.

* * * * * * *

The Principles of Practice here relevant have been revised on two occasions since the entry of the Board's order. The first revision and the preamble thereto (25 F.R. 12430 et seq., December 6, 1960) read as follows:

PART 300 - PRINCIPLES OF PRACTICE OF THE CIVIL AERONAUTICS BOARD

On March 18, 1960, the Board issued a Notice of Proposed Rule Making, Docket 11221, proposing various amendments to Part 300, the Board's Principles of Practice, and Part 302, the Board's Rules of Practice in Economic Proceedings. This rule making proceeding was instituted as a result of the Board's opinion in the New York-San Francisco Non-stop Service Case, Docket 9214, which was adopted on November 19, 1959. In that decision the Board stated that in view of the various problems of interpretation and application of the Board's Principles of Practice, which became apparent during that proceeding, the Board would undertake a prompt rule making reexamination looking toward modification and clarification of its regulations. In the Notice of Proposed Rule Making the Board proposed the following amendments to Parts 300 and 302.

1. Define "private communications."
2. Define "on the merits."
3. Establish guidelines as to what constitutes improper solicitation.
4. Establish at what stage the rules concerning improper attempts to influence become applicable.

In addition to these specific issues, the Notice of Proposed Rule Making also contained a general clause inviting suggestions as to other improvements of the Board's rules concerning ethical practices.

Comments and suggestions in response to the Notice have been received from 49 C.A.B. practitioners (Practitioners) who responded as a group, and from several air carriers and individual practitioners. The Board has reviewed these comments and suggestions and due consideration has been given to all relevant matters presented.

The most comprehensive comments and recommendations were those submitted by the Practitioners which generally cover but go beyond the scope of the specific issues raised by the Notice. The comments relating to the specific issues raised by the Board's Notice are generally favorable to the Board's proposed revision of Part 300. The attached final regulation, therefore, defines a "private communication on the merits" as "a written or oral communication on any substantive or procedural issue in the case" (Section 300.2(a)). Thus, procedural issues, including the issue of whether a proceeding should be expedited, are issues on the merits for the purposes of the rule against private communications.

With respect to the issue of solicitation, the Board's Notice recognized that existing rules do not expressly authorize or prohibit parties from soliciting persons to support their positions either by participation in the hearing or by communications to the Board which are not improper private communications. The Notice took the position that where such solicitation does not constitute an effort to bring pressure or influence to bear on the Members of the Board or its staff, or the examiner in the case and ~~it is~~ contemplated that the support will be expressed within the framework of the Board's rules, the solicitation of support is proper. The Board, therefore, proposed a new Section 300.2(e) which would make it improper for any party to a proceeding to engage in any activity which may reasonably be expected to result in producing communications to the Board or its staff, or the examiner in the case, which will not be served upon all the parties or orally presented at a hearing or oral argument. This provision, while not prohibiting parties from soliciting the support of third persons, would nevertheless require that the solicitation be undertaken in a manner which would assure that such persons would not present their position, facts, or any other relevant material outside the framework of the Board's rules. The Practitioners, while not objecting to the Board's substantive proposal, suggest that it would be better to establish definite guidelines as to what constitutes improper solicitation than to rely upon general language. This suggestion appears to have merit and has been incorporated in Section 300.2(e) which makes it improper for any party to solicit communications to the Board or its staff, or the examiner in the case, other than proper communications by parties or non-parties permitted under Rules 14 and 15 of the Board's Rules of Practice. Moreover, a party soliciting support of any person must call such person's attention to the provisions of Rules 14 and 15.

In the New York-San Francisco opinion, the Board raised the question whether its prohibitions against ex parte communications apply to proceedings requesting institution of an evidentiary hearing on a route application. The Board's Notice of Rule Making proposed that these protective principles be made applicable to all matters to be decided upon an evidentiary record. With respect to matters required by statute or general rule to be decided after notice and hearing, the rules would be made applicable from the time an application is filed. As to matters which the Board voluntarily sets down for an evidentiary hearing, the rules would be applicable from the time of such Board action. These provisions are set forth in Section 300.2 of the final regulation and will permit the Board in the future to handle problems like those presented in the New York-San Francisco Case.

As indicated above, the comments submitted by the Practitioners were directed not only to the specific issues raised by the Board's Notice of Rule Making, but to other matters as well. With respect to other matters involving Part 300, they recommend the following:

1. Expand the applicability of Section 300.2 to include certain non-hearing cases of an adversary nature. At the present time, the Board's rules against ex parte communications apply to proceedings which are decided by the Board after notice and hearing and upon a formal record. Practitioners contend that certain non-hearing cases (i.e., exemptions under Section 416(b) of the Act) can have a profound competitive effect upon air carriers and, therefore, should fall within the proscription against private communications.

It does not appear to the Board that the solution to this problem lies in expanding Part 300 to include rule making and other non-hearing proceedings. Such a regulation would seriously hamper the Board in carrying out its duties and responsibilities and would result in delays in the Board's work. In addition to its statutory responsibilities of a quasi-judicial nature, the Board has certain quasi-legislative functions as well as the responsibility for the promotion, encouragement, and development of civil aeronautics. In performing these functions the Board and its staff should not be restricted to the same extent as in formal quasi-judicial proceedings.

By making the prohibition against ex parte communications applicable to cases which are determined on the basis of a formal record after notice and hearing, the Board's present rule (which goes beyond the protective provisions of the Administrative Procedure Act) adequately preserves the principles of basic fairness for all concerned with the administrative process. We are cognizant of the fact that certain non-hearing cases may contain adversary issues and therefore require the protective provisions of the Principles of Practice. The Board should be free to make its Principles of Practice applicable to such cases and we have amended Section 300.2 so that the prohibition against ex parte communications is applicable to (1) cases which are to be decided by the Board after notice and hearing and upon a formal record, and (2) non-hearing cases which the Board by specific order may designate. We believe this is a better solution to the problem than expanding the rule to include all non-hearing cases as suggested by Practitioners.

2. Establish a procedure whereby improper oral communications are reduced to writing and served on all parties. The Practitioners have suggested that the Board establish a procedure whereby improper oral communications are preserved and notice of such communications is served on all parties. The burden such a provision would place upon the Board Member or employee would be substantial. Considering the many telephone calls and oral communications made to the Board and its staff in matters other than the merits of formal hearing cases, it would be difficult to delineate between matters which properly fall within such a provision. Moreover, the Member or employee might find himself in the position where he could not readily reduce such oral presentation to writing. From the standpoint of fairness, the person making the oral presentation would not have an opportunity to see the written memorandum until after it had been circulated to the other parties to the proceeding. If it were then contended that the memorandum did not properly reflect the oral conversation, fair play would require that an opportunity should be given to correct the record since one's reputation might well be involved. This, of course, would serve to further delay the disposition of the Board's proceeding. The suggestion of the Practitioners that oral communications be reduced to writing and served upon all parties therefore has not been incorporated in the regulation.

3. Prohibit certain staff members from communicating with the Board. The Practitioners have suggested that the Board amend its rules to prohibit certain staff members, in addition to those who served as witness or counsel in a case, from communicating with the Board. In support of this proposal, the Practitioners contend that staff members who have participated in the formulation of the staff's

position play just as important a role in the proceeding as staff witnesses and counsel, and therefore should be prohibited from communicating with Members of the Board.

The Board's present regulations prohibit Board witnesses and counsel in all cases from communicating with the Board. In accusatory cases the Board's internal rules not only bar any staff witness and counsel who participated in the case, but also the staff of the entire office or bureau. Both provisions go beyond the separation-of-functions requirement of Section 5(c) of the Administrative Procedure Act. The proposals made by Practitioners would prevent the Board from utilizing the expertise of its staff and would result in serious delays in the handling of Board work. We therefore reject this suggestion of Practitioners.

4. Amendment of rules to deprive a party of the relief he seeks in a proceeding if he violates the Board's rules. The Board's existing regulation provides that a person who violates its rules may be temporarily or permanently denied the privilege of appearing or practicing before the Board. Practitioners propose that the Board amend its rules to further provide that the Board may deprive a party which violates these rules of the relief he seeks in the proceeding. The Board believes that this suggestion has considerable merit since such a provision will materially assist the Board in enforcing its Principles of Practice. We have therefore amended Section 300.6 to accomplish this objective.

5. Congressional appearances in oral argument. Practitioners suggest that Rule 14 of Part 302 of the Board's Procedural Regulations be revised so that non-parties could participate in a proceeding "only by presenting at the hearing evidence and memoranda relevant to issues in the case." This proposed change is discussed in the Explanatory Statement to a Notice of Proposed Rule Making issued simultaneously herewith.

This amendment to Part 300 constitutes a procedural regulation and therefore may be made effective on less than 30 days' notice.

In consideration of the foregoing, the Board, effective December 6, 1960, amends Part 300 of its Procedural Regulations (14 CFR Part 300)

1. By amending Section 300.2 to read as follows:

§ 300.2 Hearing cases; improper influence. It is essential in cases to be determined after notice and hearing and upon a record, or any other cases which the Board by order may designate, that the Board's judicial character be recognized and protected. Therefore, from the time of filing of an application or petition which is to be passed upon by the Board after notice and hearing, or, in case of other matters, from the time of notice by the Board that such matter shall be determined after notice and hearing and upon a record or that its Principles of Practice shall be applicable thereto:

(a) A written or oral communication on any substantive or procedural issue in the case to a Member of the Board or its staff, or to the examiner in the case other than in compliance with the Board's Rules of Practice by any person, either in private or public life, shall be deemed a private communication on the merits. Such communications, unless otherwise provided for by law or published rule are hereby prohibited. Provided, That this prohibition shall not be deemed to apply to informal complaints filed with the Board or to communications with staff members of the Board who are in the course of preparing a case, or for the purpose of determining whether a complaint shall be docketed, or to the usual informal communications between counsel, including discussions to effectuate a stipulation, or to settlement discussion between parties and the Board's enforcement staff, or investigative activities, or to other communications which are deemed proper in proceedings in the Federal courts. Communications which merely make inquiry as to the status of a proceeding without discussing issues are not considered communications on the merits. Any prohibited communication in writing received by the Board or its staff or the examiner in the case, shall be made public by placing it in the correspondence file of the case which is available for inspection and copying during business hours in the Board's Docket Section, but will not be considered by the Board or the examiner as part of the record for decision.

(b) Requests for expeditious treatment of a pending application will be considered communications on the merits. If made by a party or applicant for intervention, such a request shall be made by motion (§ 302.18). If made by any other interested person, such a request shall be made in accordance with the requirements in § 302.14. A request which is not made in accordance with the Board's rules shall be placed in the public correspondence file and will not be considered by the Board.

(c) It is improper that there be any private communication on the merits of any substantive or procedural issue in the case to a Member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(d) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the Members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

(e) It is improper that any party solicit communications to the Board or any of its members or its staff or to the examiner in the case other than proper communications by parties or non-parties permitted under Rules 14 and 15 of the Board's Rules of Practice. A party soliciting support of any person shall call such person's attention to the provisions of Rules 14 and 15.

2. By amending Section 300.6 by inserting the designation (a) after the title "Violations" and by adding a new paragraph (b) to read as follows:

(b) Where appropriate in the public interest the Board may deny the relief requested by a party in a proceeding subject to this Part in which such party has violated any provisions of this Part.

The second revision and the preamble thereto (26 F.R. 4282 *et seq.*, May 17, 1961) read as follows:

PART 300 - PRINCIPLES OF PRACTICE OF THE CIVIL AERONAUTICS BOARD

CLARIFYING AMENDMENTS

On December 1, 1960, the Board adopted Amendment No. 1 (Regulation PR-43, 25 F.R. 12430) to Part 300 (14 CFR Part 300). This amendment defined private communication on the merits, established guidelines as to what constitutes improper solicitation, and determined at what stage of a proceeding the Board's Principles of Practice become applicable.

Since the adoption of this amendment the Board has received comments suggesting certain clarifying amendments of Part 300. The Board has reviewed these comments and concludes that several of the suggestions should be adopted. These comments and suggestions are discussed in the context of the preamble to PR-47, amending Part 302, issued simultaneously herewith.

Since these amendments are procedural rules, notice and public procedure hereon are not required and the amendments may be made effective upon less than 30 days' notice.

In consideration of the foregoing, the Board, effective May 17, 1961, amends Part 300 - Principles of Practice of the Civil Aeronautics Board (14 CFR Part 300) by

1. Amending § 300.2 by deleting the second sentence of the first paragraph and inserting in lieu thereof the following:

> Therefore, from the time of filing of an application or petition which can be granted by the Board only after notice and hearing, or, in case of other matters, from the time of notice by the Board that such matters shall be determined after notice and hearing and upon a record or that its Principles of Practice shall be applicable thereto:

2. Amending paragraph 300.2(d) to read:

> It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the Members of the Board, its staff or the examiner in the case, or that such person or any member of the Board's staff or an examiner, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

3. Amending paragraph 300.2(e) to read:

> It is improper that any person solicit communications to the Board or any of its members or its staff or to the examiner in the case other than proper communications by parties or non-parties permitted under Rules 14 and 15 of the Board's Rules of Practice. Anybody soliciting the support of another person shall call such person's attention to the provisions of Rules 14 and 15.

APPENDIX C

The relevant provisions of the Rules of Practice in Economic Proceedings of the Civil Aeronautics Board (14 C.F.R. 302 _et seq._) in effect at the time the Board issued its final order in this case read as follows:

> Sec. 302.14. _Participation in hearings by persons not parties_. Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned.
>
> Sec. 302.15. (c) _Petition to intervene_--(1) _Contents_. Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he thinks he should be permitted to intervene. The petition should make specific reference to the factors set forth in paragraph (b) of this section.
>
> (2) _Time for filing_. Unless otherwise ordered by the Board, any petition for leave to intervene shall be filed within the following time limits:
>
> (i) In a proceeding where the Board issues a show cause order proposing fair and reasonable mail rates, such petition shall be filed within the time specified for filing notice of objection.
>
> (ii) In all other proceedings, including mail rate proceedings where no show cause order is issued, the petition shall be filed with the Board prior to the first prehearing conference, or, in the event that no such conference is to be held, not later than fifteen (15) days prior to the hearing.
>
> (iii) A petition to intervene in any Board proceeding filed by a city, other public body, or a chamber of commerce shall be filed with the Board not later than the last day prior to the beginning of the hearing thereon.

A petition for leave to intervene which is not timely filed shall be dismissed unless the petitioner shall clearly show good cause for his failure to file such petition on time.

* * * * * * *

Sec. 302.18. Motions--(a) Generally. An application to the Board or an Examiner for an order or ruling not otherwise specifically provided for in this part shall be by motion. After the assignment of an Examiner to a proceeding, and prior to his recommended decision, or the expiration of the period within which exceptions to his initial decision may be filed, or the certification of the record to the Board, all motions shall be addressed to the Examiner. At all other times motions shall be addressed to the Board. All motions shall be made at an appropriate time depending upon the nature thereof and the relief requested therein.

(b) Form and contents. Unless made during a hearing, motions shall be made in writing in conformity with §§ 302.3 and 302.4 shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon. Motions made during hearings, answers thereto, and rulings thereon, may be made orally on the record unless the Examiner directs otherwise.

(c) Answers to motions. Within seven (7) days after a motion is filed, or such other period as the Board or Examiner may fix, any party to the proceeding may file an answer in support of or in opposition to the motion, accompanied by such affidavits or other evidence as it desires to rely upon.

* * * * * * *

Sec. 302.19. (g) The provisions of this section are not applicable to the attendance of the Board members, officers or employees or the production of documentary evidence in the custody thereof at a hearing. Applications therefor shall be addressed to the Examiner in writing and shall set forth the need of the moving party for such evidence and its relevancy to the issues of the proceeding. Such applications shall be processed as motions in accordance with Rule 18, except that the grant thereof by an Examiner, in whole or in part, shall be immediately reviewed by the Board upon its own initiative and shall be subject to final Board action.

* * * * * * *

Sec. 302.24. (j) Receipt of documents after hearing. No document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the Examiner.

* * * * * * *

Sec. 302.26. Proposed findings and conclusions before the Examiner or the Board. Within such limited time after the close of the reception of evidence fixed by the Examiner, any party may, upon request and under such conditions as the Examiner may prescribe, file for his consideration briefs to include proposed findings and conclusions of law which shall contain exact references to the record and authorities relied upon. The provisions of this section shall be applicable to proceedings in which the record is certified to the Board without the preparation of an initial or recommended decision by the Examiner.

* * * * * * *

Sec. 302.31. Briefs before the Board.--(a) Time for filing. Within such period after the date of service of any initial or recommended decision of an Examiner or tentative decision by the Board, as may be fixed therein, any party may file a brief addressed to the Board, in support of his exceptions to such decision, or in opposition to the exceptions filed by any other party. In cases where the Board or the Examiner is of the opinion that, because of the limited number of parties and the nature of the issues, the filing of opening, answering and reply briefs will not unduly delay the proceeding and will assist in its proper disposition, the Board or the Examiner may direct that the parties file briefs at different times rather than at the same time.

The Rules of Practice here relevant have been revised on two occasions since the entry of the Board's order in this case. The first revision and the preamble thereto (25 F.R. 12430 et seq., December 6, 1960) read as follows:

PART 302 - RULES OF PRACTICE IN ECONOMIC PROCEEDINGS

MOTIONS OF INTERESTED PERSONS FOR EXPEDITION

On March 18, 1960, the Board issued a Notice of Proposed Rule Making, Docket 11221, 25 F.R. 2436, proposing several amendments in Part 300, the Board's Principles of Practice, and Part 302, the

Board's Rules of Practice in Economic Proceedings. In respect of Part 302 the Notice proposed an amendment to Section 302.14 which would provide for a procedure whereby interested persons other than parties may request that a proceeding be expedited.

Final action on the proposals in said Notice relating to Part 300 is being taken simultaneously, by adoption of Amendment 1 to Part 300 and the Preamble thereto is hereby incorporated herein by reference. Among the amendments to Part 300 which are being adopted is one which outlaws communications to the Board on procedural issues in a hearing case made otherwise than in compliance with the Board's Rules of Practice, Section 300.2(a). Under this provision persons who, because they are not parties, have no standing to make motions for expedition of the proceeding under Rule 18, could not urge expedition at all. Hence, upon consideration of all pertinent matter presented, it appears to the Board that Rule 14 should be amended to permit interested persons to make motions for expedition.

Since this amendment to Part 302 constitutes a procedural rule it may be made effective on less than 30 days' notice.

ACCORDINGLY, the Board hereby amends Part 302 of its Procedural Regulations, 14 CFR Part 302, effective December 6, 1960, and applicable to pending proceedings, by amending Section 302.14 to read:

§ 302.14. Participation in hearing cases by persons not parties.

(a) Requests for expedition. In any case to which the Board's Principles of Practice, Part 300, are applicable, any interested person, including any State, subdivision thereof, State aviation commission, or other public body, may by motion request expedition of such case or file an answer in support of or in opposition to such motions. Such motions and answers shall be served upon all parties to the case as provided in § 302.8 hereof.

(b) Participation in hearings. Any person, including any State, subdivision thereof, State aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board.

(c) Participation in oral argument. A representative of any department, agency or branch of the Federal Government or of any State Government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned.

The second revision and the preamble thereto (26 F.R. 4282 *et seq.*, May 17, 1961) read as follows:

PART 302 - RULES OF PRACTICE IN ECONOMIC PROCEEDINGS

PARTICIPATION IN HEARING CASES BY, AND SERVICE OF DOCUMENTS ON, PERSONS NOT PARTIES; OTHER AMENDMENTS

On December 1, 1960, the Board issued a Notice of Proposed Rule Making, PDR-4, Docket 11221, 25 F.R. 12477, proposing an amendment to § 302.14 of the Board's Rules of Practice (14 CFR 302.14) which would permit persons who are not parties to a proceeding to appear, and/or submit written statements, only at the hearing stage of the proceeding. At the same time, in PR-44 the Board amended § 302.14 (14 CFR 302.14), to provide for a procedure whereby interested persons other than parties may request that a proceeding be expedited, and in PR-43 adopted as final rules certain amendments to Part 300 - Principles of Practice of the Civil Aeronautics Board (14 CFR Part 300).

Comments and suggestions in response to the Notice have been received from a number of interested persons, including Members of Congress, 1/ 44 attorneys practicing before the Board (Practitioners), two state aviation commissions, one air carrier, and one city aviation commission.

After consideration of all relevant matter presented the Board has decided to adopt the amendments to § 302.14 substantially as proposed in the Notice.

Section 302.14 is applicable to cases which are decided by the Board upon a formal record after notice and hearing. Elimination of oral argument by non-parties from the formal record will accomplish two desirable objectives: (1) it will enhance the judicial character of Board proceedings in hearing cases since it will exclude the filing of statements with the Board at a time when the parties can no

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1/ In addition to the Notice provided in the Federal Register, the Board advised each Member of Congress of the proposed amendment by letter dated December 1, 1960.

longer introduce evidence in support or rebuttal of factual matter therein, and will make possible enforcement of the rule that factual references in oral argument must be based solely on the evidence contained in the formal record; and (2) it will expedite Board procedures since only parties will be allowed to present oral argument.

Comments in opposition to the amendment took the position that participation in oral argument before the Board provides the best available means for giving members of the Congress an understanding of the problems confronting the Board; that in the formulation of the overall policy, the Board needs the observations and opinions of Congressmen and State officials, which can be obtained by permitting such persons to present oral argument or submit written statements to the Board; that it is democratic and right for the Board to hear members of Congress and other non-parties; and that the amendment is not necessary for the protection of the Board's processes. One comment suggested that representatives of the Federal or State Governments should be permitted to present oral argument if they file a written statement on the issues at the hearing stage of the proceeding.

These arguments do not appear to be well taken. The best way for obtaining an understanding of overall Board problems is not presenting oral argument in a litigated case. Members of Congress can more readily obtain a complete understanding of Board problems from other sources such as the Board's Annual Report to the Congress and testimony on behalf of the Board or by industry representatives before Congressional committees. It should be noted that the amendment of Rule 14 will not exclude Congressmen and State officials from Board proceedings; it will only require that they appear at the hearing or submit a statement prior to the close of the hearing in order to give the parties to the proceedings an opportunity to support or rebut such statement. The suggested procedure of permitting non-parties to file, at the hearing stage, a statement of issues which they intend to raise in oral argument does not appear feasible. The issues to be discussed at oral argument can be determined only after the examiner's decision has been issued. The Board believes that this amendment is necessary to further implement the provisions of Sections 5(a) and 7(d) of the Administrative Procedure Act in formal Board proceedings.

The Practitioners also suggested that the Board amend subparagraph 302.8(a)(2) to require service of all documents on persons whose petition for consolidation or intervention is pending before the Board. The Board is of the view that this proposal is too broad. It believes, however, that, in certificate cases, motions by parties and non-parties to expedite a proceeding should be served on persons who have requested intervention or consolidation. Therefore, §§ 302.8 and 302.14(a) will be so amended. These amendments will further implement the Board's recent amendment to paragraph 300.2 (b) of its Principles of Practice, in which it is specifically provided that requests for expeditious treatment of a pending application are considered communications on the merits. The Board also concludes that in order to afford timely information to all parties, any protests or memoranda in opposition or support of an application filed pursuant to Sections 401 and 402 of the Act should be filed and served before the close of the hearing, and §§ 302.6 and 302.14 will be amended accordingly.

With respect to Practitioners' comments and suggestions pertaining to Part 300, the Board's Principles of Practice, the Board concludes that several of the suggestions have merit and should be adopted. 2/

Currently effective § 300.2 provides that the Principles of Practice apply "from the time of filing of an application or petition which is to be passed upon by the Board after notice and hearing . . ." The wording of this rule is such that it could be interpreted as not applying to applications and petitions which, in the Board's discretion, may be denied without notice and hearing, although they could be granted only after notice and hearing. Such interpretation would be contrary to the Board's intent. Consequently, § 300.2 will be amended to provide that Part 300 applies from the time of filing of an application or petition for relief that can be granted by the Board only after notice and hearing.

Section 300.2(d) specifically prohibits attempts to pressure or influence Members of the Board or any member of the Board's staff. In adopting this rule the Board intended it to be applicable to examiners. In light of comments received the Board has decided to amend the rule to specifically prohibit attempts to pressure or influence examiners.

Section 300.2(e) presently prohibits parties from soliciting improper communications. The Board agrees with comments received that this rule should be expanded to apply to all persons.

Since the foregoing amendments to Part 302 are procedural rules, notice and public procedure hereon are not required and the amendments may be made effective on less than 30 days' notice.

In consideration of the foregoing, the Board, effective May 17, 1961 amends Part 302 - Rules of Practice in Economic Proceedings (14 CFR Part 302) as follows:

2/ These amendments are set forth in PR-48 issued simultaneously herewith.

1. By changing the section head of § 302.6 to Answers, protests or memoranda and adding a sentence to read as follows:

> Protests or memoranda of opposition or support, where permitted by statute, shall be filed before the close of the hearing in the case to which they relate, and shall be served as provided in subparagraph 302.8(a)(2) of this Part.

2. By deleting the text of subparagraph 302.8(a)(2) and substituting the following:

> The parties. Answers, petitions, motions, briefs, exceptions, notices or any other documents filed by any party or other person with the Board or an examiner shall be served by the person filing such document upon all parties to the proceeding in which it is filed; provided that motions to expedite filed in any proceeding conducted pursuant to sections 401 and 402 of the Act, shall, in addition, be served on all persons who have petitioned for intervention in or consolidation of applications with such proceeding. Proof of service shall accompany all documents when they are tendered for filing.

3. By deleting the phrase "upon all parties to the case" in the last sentence of paragraph 302.14(a).

4. By deleting the third and last sentences of paragraph 302.14(b) and inserting in lieu thereof the following text:

> Such persons may also present to the examiner a written statement on the issues involved in the proceeding. Such written statements, or protests or memoranda in opposition or support where permitted by statute, shall be filed and served on all parties prior to the close of the hearing.

5. By deleting paragraph 302.14(c).

BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15414 and 15415

UNITED AIR LINES, INC., TRANS WORLD AIRLINES, INC.,
Petitioners,
v.
CIVIL AERONAUTICS BOARD, Respondent,

AMERICAN AIRLINES, INC., CITY AND
COUNTY OF SAN FRANCISCO,
Intervenors.

CLERK

ON PETITIONS FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD

ROBERT A. BICKS,
Acting Assistant Attorney General,

RICHARD A. SOLOMON,
Attorney,
Department of Justice,

FRANKLIN M. STONE,
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Civil Aeronautics Board.

JOHN H. WANNER,
Deputy General Counsel,

O. D. OZMENT,
Associate General Counsel,
Litigation and Research,

ULRICH V. HOFFMANN,
Attorney,
Civil Aeronautics Board.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

In respondent's view, the dispositive questions are:

1. Whether the receipt of communications from public officials supporting new service which are not served on the parties to the Board proceeding involved but which are placed in a public file for all to see serves to vitiate the proceeding.

2. Whether the Board abused its discretion in refusing to withdraw the award of nonstop New York-San Francisco authority to American Airlines as a sanction against certain violations of the Board's principles of practice.

3. Whether the Board erred (a) in refusing to produce a staff report containing recommendations for Board action where there was no showing of any need for any factual information contained therein; or (b) in permitting a member not hearing oral argument to participate in the decision.

4. Whether the Board's findings set forth a rational basis for its action, are sufficiently explicit to enable the Court to relate the evidence to them, and are supported by the evidence.

5. Whether the Board abused its discretion in denying a petition to reopen the record to receive additional evidence relating to the economics of jet operations found not to be materially different from that already before the Board.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15414 and 15415

UNITED AIR LINES, INC., TRANS WORLD AIRLINES, INC.,
Petitioners,
v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC., CITY AND
COUNTY OF SAN FRANCISCO,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS
OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

The petitioners (United and TWA) have long held authority to conduct nonstop operations between New York and San Francisco. Until entry of the principal order here challenged (Tr. 4730, 4786), American Airlines, Inc. also was authorized to conduct operations between these cities but with restrictions requiring at least one stop at an intermediate point. The petitioners here seek review of the Board's order and related ones which removed this restriction, and authorized American to operate nonstop flights between New York and San Francisco in competition with them. The order is challenged (1) on various procedural grounds and (2) on an asserted lack of findings and evidence in relation to the substantive merits of the award.

The background of the Board's order and its procedural aspects

In 1947, American's transcontinental Route 4 (then from Boston and New York to Los Angeles via Phoenix among other cities) was extended from Phoenix to San Francisco and Oakland, but with a condition that service be rendered to San Francisco or Oakland only on flights serving Dallas or Tulsa or some other southwestern city. West Coast Case, 8 C.A.B. 14, 27 (1947).[1] In 1953, American filed an application for an amendment of its certificate to eliminate this restriction (Tr. 2) and that application was granted by the Board order here challenged. However, the issue of whether American should be granted unrestricted New York-San Francisco authority was before the Board in the Denver Service Case (Order E-9735, not yet officially reported), and the Board in deciding that case on November 14, 1955 concluded that it should not be. Nonetheless, as a result of that proceeding, American was authorized to conduct operations to San Francisco via Chicago, and hence could then operate under its various authorities one-stop service between New York and San Francisco via such cities as Chicago, Dallas or Tulsa.[2] One of the considerations involved in the Board's award in the Denver Service Case was that American would "be in a position to continue its participation [heretofore via Dallas or Tulsa] as the third transcontinental carrier between the Bay area and New York * * *." (Order E-9735, pp. 11, 12). While the Board's hearing examiner and Bureau of Air Operations had recommended unrestricted authority to American, the Board was of the then view that such authority should not be granted because of over-all competitive imbalance which would result.

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[1] This extension rested on, among other things, the desirability of preserving American's historic participation in San Francisco traffic, then carried by connection at Los Angeles. The restriction then imposed was to "preclude nonstop service between San Francisco-Oakland and points in the East commonly served by American and either TWA or United" (8 C.A.B. at p. 18).

On May 3, 1957, American filed a motion requesting the Board to sever and expedite that portion of its application in Docket 5903 which would permit nonstop operations between New York and San Francisco (Tr. 6). The motion was supported by the civic interests involved and opposed by the petitioners. The Board initially denied the motion on June 26, 1957 (Tr. 129-130), but its order also provided for a staff study of the matter and indicated that further consideration would then be given to the question of an early hearing.[3] This study was conducted. Also, on December 2, 1957, two representatives of San Francisco met with the Board and urged a general need for more air service to that city including a third nonstop service to New York. The conference was recorded verbatim, and the record made public (Tr. 5466-5482; see also Tr. 641).

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[2] American's Routes 7 and 25, between Boston and New York on the one hand and Chicago on the other via various intermediate points, were extended in the Denver Service Case from Chicago to San Francisco but in such fashion that a stop was required at Chicago. This was to fill needs then found for a third Chicago-San Francisco nonstop operation in competition with TWA and United, and needs for various services between the San Francisco area and points east of Chicago in competition with the operations of either TWA or United, or both.

[3] The order provided (Tr. 129)

> " * * * in view of the allegations contained in the petition and supporting documents the Board has directed the staff to review the problems of the air service pattern between New York and San Francisco and report the results of that study to the Board on or about December 1, 1957, so that it may examine the public need for an early hearing on the issue of nonstop service."

Thereafter, on January 13, 1958 the Board set the matter down for expedited hearing (Tr. 136). Petitions for reconsideration followed in which it was requested (Tr. 598, 611) that the staff study be made a part of the record so that petitioners would be aware of the basis of the Board's action. The Board declined to do so (Tr. 639), stating that its orders "set forth the basis for the Board's decision to direct expedited proceedings on American's application." (Tr. 641).[4] Thereafter, the Board's hearing examiner denied a motion for production of the study made at the prehearing conference by TWA (Tr. 670-671), and one made shortly thereafter by United (Tr. 704, 714). Subsequently, toward the close of the hearings, counsel for TWA inquired of a Bureau of Air Operations witness (Williamson) if Messrs. Miller, Dregge and Roth of the Bureau were the authors of the study (Tr. 2020). The examiner foreclosed this line of questioning, and also refused to issue a subpoena _duces tecum_ to those three persons (Tr. 2020-2024)

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[4] These grounds were that (1) the Board is not restricted to a "priority of filing" rule in hearing its cases, and the over-all importance of the New York-San Francisco market and the nonstop scheduling practices of TWA and United in relation thereto were such as to indicate that there might be service deficiencies and to warrant investigation on its part (Tr. 640-641) and (2) a proceeding restricted to a long-haul market such as the one involved would afford an opportunity to the Board to conduct an investigation into the imminent impact of the operation of jet aircraft with attendant benefits in formulating sound regulatory policies (Tr. 641).

There also were various motions after the close of the hearing to reopen the record to receive additional evidence with respect to jet operations, described _infra_ in relation to the substantive grounds for the Board's award to American.

Oral argument was heard in the case by four members of the Board (Tr. 4504). The fifth member, Mr. Hector, participated in the decision, and the award to American was by a 3 to 2 vote with Mr. Hector voting with the majority (Tr. 4757). Petitions for reconsideration were filed by these petitioners (Tr. 4793, 5117), in which error was ascribed to his participation solely on the grounds that he had not heard the argument (Tr. 4806, 5140). There were various members of Congress who appeared at the oral argument (Tr. 4502). United had initially requested a greater time allowance for oral argument than that granted to it (Tr. 4247, 4471), and its petition contended that it had not been given sufficient time either in relation to the other parties or in the light of the time allocated to the members of Congress (Tr. 5138). Error also was charged in the issuance by the Board of a press release (Tr. 4729) announcing its tentative vote prior to issuance of the opinion (Tr. 5142). Additionally, it was then contended that various letters (mostly from public officials) in the public correspondence file of the docket constituted improper _ex parte_ communications and pressure in violation of the Board's principles of practice and procedural rules, and in substance that their effect, together with the earlier conference with the San Francisco officials, was either to vitiate the Board's proceeding or to disqualify San Francisco and American from receiving the nonstop service and award (Tr. 4796-4809, 4817, 5119-5125). The Board determined to hear further argument on these allegations of improper ex parte communications (Tr. 5332), and the petitions for reconsideration failed in other respects for want of a majority (Tr. 5333).[5/]

Argument on these so-called "ex parte" issues was heard by the Board on November 12, 1959 (unprinted transcript, pp. 5347-5434). As the Board's supplemental order confirming the grant to American (Tr. 5435) discloses, it was conceded that no Board member was consciously biased or improperly influenced; that there was no venality of corruption on the part of anyone; and that no Board member would be disqualified from sitting in further judgment in the case (Tr. 5436-5437). There likewise was no claim of conscious impropriety on the part of any third person who wrote to the Board, or that it would be improper for any party to attempt to obtain support from these persons in the manner permitted by the Board's rules (Tr. 5438). Further, the petitioners expressed no desire for further evidentiary hearings, taking the position that such hearings would only provide proof of their specific allegations or show matters entirely cumulative in nature

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[5/] Mr. Hector had left the Board prior to this action, and so the Board stood two-to-two on the substantive merits of the award to American.

(Tr. 5443-5444). Rather, their position in substance was that (1) the communications in the Board's public file were received contrary to the Board's rules of practice, (2) their receipt, transmittal and alleged incitement were in violation of the Board's principles of practice both as ex parte communications and attempts to bring pressure, and (3) such communications in any event denied them procedural and substantive due process, and particularly since no one could say that the Board members might not have been unconsciously influenced. For these reasons, together with an alleged necessity for vindicating the Board's processes and avoiding any appearance of evil, it was asserted that the entire proceeding was vitiated or, at the minimum, that there were attempts to subvert the adjudicatory process which disqualified American and San Francisco.

These claims were rejected by the Board. As to vitiation of the case, it pointed out that petitioners' various concessions left only the bare assertion that the communications might have had some effect on the members' decisions, and that assertion was rejected (Tr. 5438). The Board stressed that the communications received were not treated as record materials and had not been considered by the Board members in reaching its decision.[6] The Board stated that it would have taken further action in this proceeding if there had been "any threat, real or apparent, to the impartiality of our deliberative process" (Tr. 5456, 5457), but it found no such threat. It pointed out that the communications were commonplace (Tr. 5454, 5457) and further, were "merely corroborative of the Board's normal assumption in any route case that all public officials and civic bodies will favor new or additional air service" (Tr. 5457). The Board concluded that the various public communications (including the conference with San Francisco representatives) did not in the circumstances deprive the petitioners of a fair hearing or vitiate the proceeding (Tr. 5446, 5456).[7/]

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[6] The Board pointed out that in fact such communications are rarely brought to the attention of the Board except for signature on an acknowledgment letter prepared by the staff (Tr. 5454, 5457).

The Board found some violations of its principles of practice. However, it also held that there were areas of indefiniteness in its rules which militated against such findings, and that clarification was in order and would be made in a rule-making proceeding for consideration of the problems involved (Tr. 5436, 5440-5444).[8/] So far as

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[7/] The Board also found that the reasonableness of its conclusions were buttressed by the tardy manner in which the charges of impropriety were raised (Tr. 5456, 5457).

[8/] The principles of practice (infra, p. 66) preclude "private" communications on the "merits" in cases "to be determined after notice and hearing," and further declare it to be improper for any person to attempt to bring pressures on the Board in such cases. About 80% of the communications involved were prior to the issuance of the order setting the case for hearing. It was contended that these communications, whose principal thrust was to the matter of an accelerated hearing, were neither communications on the merits nor ones in relation to a pending proceeding since no hearings had been ordered. The Board interpreted the principles as applicable to the issue of expedited hearing (Tr. 5443), but pointed out that the regulation was ambiguous on the point. There were other letters of a purely procedural nature as to which the Board stated a need for a clarifying

(footnote continued)

the rules of practice were concerned, the Board stated (Tr. 5454) that, while such rules were applicable to those formal documents submitted for the record, they had not been applied to public communications of the type here involved. Rather, said the Board, because of its inability to isolate itself from the public, it regularly directed its staff to prepare acknowledgments of such communications and to place them in the public correspondence file. This procedure was noted to comport with that embodied in certain proposed legislation on the subject, but the Board said that this too would be explored in the further rule-making proceedings.

San Francisco's activities are discussed by the Board at Tr. 5445-5448, and Tr. 5455-5456. The Board found the city to have been "motivated by an excess of zeal" (Tr. 5445) to conduct which failed "to square" with a strict interpretation of the regulations (Tr. 5449). It further noted that the materials submitted, all of which went into the public correspondence file, were not improper in themselves but rather that the informal manner in which they were submitted was objectionable (Tr. 5446); and that, while there was no objection to solicitation of support from public officials within the framework of the Board's

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(footnote continued)
regulation, together with the question of whether communications placed in a public docket and as to which there otherwise was no element of secrecy should be regarded as "private" ones (Tr. 5443). As to "pressures," a major weakness was found in the area of lack of definition as to what constituted improper "attempts toø bring pressure" in the light of the statutory provisions permitting anyone to file a memorandum in support of or opposition to a certificate application or amendment (Sections 401(c) and (g), infra, pp.62-63), of the Board's implementing Rule 14 (infra, p. 68) and the legitimate interest in questions of air service by public officials (Tr. 5440-5442).

procedural rules, San Francisco appeared to have gone beyond that point (Tr. 5447). The Board further noted that the "propensity of public officials" to lend spontaneous support to proposals for new service mitigated against any assumption that San Francisco had inspired all of the communications (Tr. 5447). It held that it could not find that the conduct was "so egregious as to require a sanction which would deprive the Bay Area" of needed air service (Tr. 5446, 5449), and in any event that there would be no warrant for penalizing the residents of the New York-New Jersey area, and American, for any improper conduct on the part of San Francisco (Tr. 5445, 5449).

American's activities are summarized at Tr. 5449-5453. The Board held that the only violations shown were three letters from travel agents to the Board at the request of American employees prior to the time the case was set for hearing (Tr. 5451-5452). The solicitation of a telegram to a congressman in 1957 was said to be questionable in that there were no hearings or oral argument in the then immediate offing (Tr. 5452). The other cited communications near the time of oral argument (letters from travel agencies to their congressmen) were held to show no impropriety in that American could properly promote intervention by congressmen under Rule 14 (Tr. 5452). The contention that congressmen in the New York area were instigated by American to communicate with the Board, because The Port of New York Authority had disavowed such activity, was held to be an obvious non sequitur (Tr. 5451). The Board also found that the remark of American's president to San Francisco's officials in 1957 to "keep hammering" for the expedited hearing did not constitute a request for improper conduct and was perfectly consistent with legitimate participation under the Board's rules (Tr. 5449-5450); nor, the Board held, was there any sufficient causal relationship between this remark and the activities of San Francisco (begun some six months before it was made) to warrant an imputation of San Francisco's activities to American.

In sum, the Board held that there had been no showing of conduct by San Francisco imputable to American, and further that American's own conduct was not disqualifying or of any material consequence (Tr. 5453). The Board found that American's activities appeared to be those of lower echelon employees not rising to "a deliberate campaign of pressure" on the part of the carrier's management, and that if there had been any such campaign it was only reasonable to assume that more would have resulted from the activities of a carrier such as American than the few travel agency letters shown (Tr. 5452-5453). Weighing these factors, and particularly the minimal or minor nature of the violation (further mitigated to some extent by the uncertainties of its rules in the areas here involved) against American's unblemished record of years of practice and service in strict accordance with the Board's regulations, the Board found no warrant for withdrawing the award from the carrier (Tr. 5453).

The substantive bases of the Board's order and the contentions concerning a need for further hearing on the economic aspects of jet operations

The evidentiary hearings herein were concluded on September 18, 1958. On February 18, 1959 (some two and a half weeks before issuance of the examiner's report on March 9, 1959 (Tr. 4083)), United filed a motion requesting the examiner to reopen the record to receive further evidence alleged to be then available relating to the costs of jet operations and volume of traffic moving between New York and San Francisco (Tr. 4048), which motion was supported by TWA (Tr. 4076). It was opposed by the other parties (Tr. 4059-4063, 4066-4073, 4074), and denied by the examiner (Tr. 4081-4082) on grounds, inter alia, that there was no showing of substantial change in the matter since close of the hearing and that certain data referred to by United was reflected in official records before the Board. United thereupon asked leave to appeal the ruling to the Board or alternatively that its motion be deemed addressed to the Board since the examiner's report had then issued (Tr. 4151), and the Board deferred consideration of the motion until after the oral argument in the case (Tr. 4246).

The hearing examiner recommended the award of nonstop authority to American (Tr. 4083-4150). The Board adopted the examiner's report, amplifying and modifying his findings in some respects (Tr. 4730-4757). In essence, the conclusions were that there had been various deficiencies in the nonstop services of United and TWA prior to the motion for expedited hearing on American's application (Tr. 4734, 4112-4115); that, until the pendency of the Board's proceeding, TWA had not matched the quantity or quality of United's service and TWA was "not a full-time vigorous competitor" (Tr. 4744-4747, 4129); that the "New York-San Francisco market has not in the past received that type of vigorous competition which its size and economic strength warranted" (Tr. 4745-4746); and that such competition should be provided by removing (Tr. 4745-4746) the restrictions on American's service.

In this connection, the Board also found that American in the past had been an active participant in the traffic involved; that its prior assigned role was intended to be that of "an effective third transcontinental carrier" in this market; and that the adjustment in route structure here involved was necessary to "permit continuation of the benefits of a third transcontinental service" (Tr. 4736-4737).[9/] These benefits, of course, were those of competition with its resultant improvement in quality and quantity of service and maximum development of traffic potential (Tr. 4128-4132, 4735, 4747). In terms of feasibility and standards for authorizing increased competition, it was pointed out that the New York-San Francisco route was one of the most important and lucrative in the nation (Tr. 4734, 4112), and that all comparable long-haul markets and many smaller ones had multicarrier nonstop service (Tr. 4734,

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[9/] Both the examiner and the Board elsewhere also recognized that a failure to lift the restriction would ultimately virtually eliminate American from the market in view of the more desirable nonstop services of TWA and United. See Tr. 4736, 4102, 4128-4129. Indeed, the Board's selection of American over Northwest rested in large part on this factor (Tr. 4753-4754).

4112). The Board also found that the recently improved services of TWA and United had not been fully explained in terms of prior equipment shortages (Tr. 4744-4746), that it should thus not rely on their assurances of future performance, and that its action represented the best assurance of good service and market development (Tr. 4747).

As to traffic potential, the findings were of steady increase over the years (Tr. 4091-4093), with excellent response to the increased schedules supplied by United and TWA (Tr. 4093), and increasing growth of the cities involved with a strong community of interest between them (Tr. 4087-4088, 4734). The traffic on the basis of 1957 data was found to be 250,000 passengers on an annual basis, or about 700 a day (Tr. 4090). The examiner's estimate, and that of the Board, was about 366,000 passengers in 1960, or 1,000 per day (Tr. 4121, 4734, 4737-4741).[10/]

The petitioners contended that this volume of traffic would not support the operations of three carriers utilizing jet equipment, in that three round trips per day would be operated by each carrier to maintain its competitive position. The examiner found no reason why the carriers could not adjust their schedules to meet seasonal and other demands, as TWA and United were in fact doing (Tr. 4124). The Board agreed (Tr. 4742-4744), stating that by 1960 each carrier could operate three daily round trips during the peak traffic season and two

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[10/] These estimates were predicated on 10% annual normal growth and a 10% "jet stimulation" figure for 1960. The contentions that the estimate was erroneous was dealt with by the Board at Tr. 4737-4741.

in the off season with better than breakeven load factors, and with good prospects of future more profitable operations.

The Board recognized that there would be competitive impact from the American authorization. Its estimate was of total annual diversion of almost $13,000,000 from TWA and United (Tr. 4784), in terms of traffic which they otherwise would obtain. However, due to the increase in the market, the estimate also was that both carriers would obtain in 1960 more gross revenue than that received in 1957, and that the traffic growth would be a constantly increasing compensating factor (Tr. 4748-4749, 4784). The Board also found out that the diversion was gross revenue, not profit; that the carriers were not faced with declining earnings; and that the diversion would not "impair the financial health of either carrier or either carrier's ability to provide certificated services" (Tr. 4749). It further pointed out that the cry of diversion and losses from competition were the familiar ones made in every new route proceeding, that the industry nonetheless had continued to grow and prosper, and that there was no reason to believe that any different result would occur here (Tr. 4749-4750).

The Board also denied the motion to reopen the record. It found that there was abundant evidence based on manufacturers' costs after extensive testing, and that it was not persuaded that any current data "necessarily covering only a relatively short operating period, would provide any materially different or more reliable information with respect to economics of turbojet service than we now have available before us" (Tr. 4751-4752). Rather, said the Board, "further hearing in this case would achieve little more than insulating, at least for a time, the existing participants in the market from the effects of a new competitor" (Tr. 4752).

STATUTES AND REGULATIONS INVOLVED

The portions of the Federal Aviation Act, the Administrative Procedure Act, and the Board regulations here principally involved are set forth in the Appendix B, infra, pp. 61 to 69. Other provisions of statutes and regulations are cited or quoted in their appropriate place in the text of this brief.[11]

SUMMARY OF ARGUMENT

I

There is no procedural error which vitiated the Board's proceeding. Petitioners concede that there was no fraud, corruption, or consciousness of being influenced by the Board. The so-called *ex parte* communications complained against were the communications from the public, or public officials, of the type habitually received in Board proceedings, which were placed in the public docket and were not considered by the Board as a part of the record in deciding the case. The Board's procedure of routinely acknowledging such communications and then ignoring them in deciding the case is a sound procedure, well within its discretion; and prior precedent makes clear that its disclaimer of consideration of the materials here in question must be accepted. Moreover, there was no showing of conduct by American which required a withdrawal of the award as a sanction against the minor violations found to have been committed by that carrier's employees.

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[11] The Civil Aeronautics Act, in force at the time of the institution of the Board's proceeding, was superseded on December 31, 1958 by the Federal Aviation Act (72 Stat. 731). The provisions of the old and new acts are virtually identical insofar as is here pertinent, and Section 1501(b) of the new statute (49 U.S.C. 1301 note) provided that then pending administrative proceedings should not abate by reason of the new statute but rather should continue "as if this Act had not been enacted." Whether this provision meant that the Civil Aeronautics Act was extended as to then pending proceedings until their final disposition is a matter of no significance here, and is adverted to only because TWA cites the Civil Aeronautics Act provisions as the pertinent ones.

The petitioners were not entitled to access to the Board's staff report in that there was no showing of need for any economic facts contained therein but only an attempt to obtain staff recommendations for possible impeachment of the Board's order expediting the proceedings. North American Airlines v. Civil Aeronautics Board, 100 U.S. App. D.C. 5, 240 F. 2d 867 (1956); Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl., 1958). It was not error for Member Hector to participate in the decision although he was not present at the oral argument in that the statute provides that the Board may "hear or receive" argument and the transcript of argument was available to him. Sisto v. Civil Aeronautics Board, 86 U.S. App. D.C. 31, 179 F. 2d 47 (1949); McGraw Electric Co. v. U.S., 120 F. Supp. 354 (E.D. Mo., 1954) aff'd 348 U.S. 804. There is no showing that United was not given a sufficient time allowance at the argument, or that the Board or the examiner failed to consider any material issue raised by TWA. Any claimed deficiencies in the examiner's report were cured by the Board's opinion, and the Board properly adopted the examiner's findings as its own in disposing in part of exceptions.

II

The Board's findings disclose a rational and adequate basis for its action, are sufficiently explicit to enable the Court to relate the evidence to them, and are supported by the evidence. Detailed computations of costs, etc., such as are contended for by United are not required. American Airlines v. Civil Aeronautics Board, 87 U.S. App. D.C. 365, 192 F. 2d 417 (1951); Minneapolis & St. Louis R. Co. v. U.S., ___ U.S. ___ , 80 S.Ct. 229 (1959). There was no abuse of discretion in refusing to reopen the record in that the new cost factors relied on by United were not such as to materially alter the prior estimates and were no more representative than those already before the Board.

ARGUMENT

I. Petitioners were afforded a fair hearing, and there was no procedural error which vitiated the Board's proceeding

A. The so-called ex parte submissions and arguments did not vitiate the Board's proceeding, nor did the Board err in declining to withdraw the award as a sanction against the violations found

The principal assertions of error herein relate to the various documents in the public file of the Board's proceeding which were not served on the petitioners, and the conference with the San Francisco officials. These communications in and of themselves are said to have vitiated the Board's proceeding on due process grounds, and on the ground that they were contrary to the Board's principles of practice and procedural rules. The petitioners further assert that the Court in any event should set aside the Board's order and direct complete new proceedings to avoid any undermining of the confidence of the public in the administrative process. TWA suggests that San Francisco and American were disqualified or estopped from receiving the award involved, and at the minimum that the Board should have embarked on further proceedings to determine whether there were attempts to subvert the administrative process other than those alleged.

Two questions are thus presented: (1) whether the receipt of these communications, which went into the public files vitiated the proceeding; and (2) whether the participation of San Francisco and American in sending, or inducing to be sent, some of these communications, adversely affected American's application so as to require disqualification, a comparative demerit, or a further hearing. We shall show that here, unlike the F.C.C. cases relied upon by the petitioners (United Br., p. 26), the Board's procedure was public and specifically designed to prevent improper approaches; and that the Board did not err in holding that its proceeding was not vitiated. We shall also show that the Board correctly determined that the violations of the principles of practice by San Francisco and some American employees did not warrant either a withdrawal of the award to American or further hearing upon American's qualifications.

1. The proceeding was not vitiated

In every route case the Board receives many letters from the public or public officials, as a result of the publicity given the proceeding or the natural propensity of public officials to support new service for their constituents. The public or public officials may participate in these proceedings in accordance with certain procedures,[12] but such persons are often neither aware of, nor do they adhere to, the rules. The Board has therefore developed a long-established method of handling such correspondence: It routinely acknowledges the letter and places it in a public correspondence file in the docket; and it ignores this file in deciding the case. This practice serves the dual purpose of politely disposing of the correspondence and, by making the letters public, "precluding any improper approaches which could not withstand full disclosure" (Tr. 5439, footnote 8). It is this practice which petitioners are attacking here.

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[12] Section 401(g) (*infra*, p. 63) specifically provides for the filing with the Board of a memorandum of protest or support by any interested person (Tr. 5441). Rule 14 provides for the participation of Federal or state officials in the oral argument. Many letters from elected officers are labeled statements under Rule 14 in lieu of oral argument, and while the rule makes no provision for written presentation, it is customary, in the absence of objection thereto by any party, to include such written submissions in the record by announcement of the Chairman at the oral argument. This was the case here.

Petitioners argue that all the communications which went into the public correspondence file in this case were ex parte in nature because they were not served upon the parties, and that the receipt of such ex parte matters violates due process and the Board's Principles of Practice and Rules of Practice. Citing the F.C.C. "influence cases,[13] they assert that the instant proceeding was vitiated.

First, it is clear that the Board's procedure here differs completely from that involved in the cited F.C.C. "influence" cases, where one or more commissioners allegedly entertained covert pleas in the privacy of their offices. Here the Board's long-established practice is not one of privacy, but of publicity, and is designed to prevent improper presentations and to insure the fairness of its proceeding.

The short answer to petitioners' arguments is the Board's disavowal of any consideration of the material in its correspondence file in deciding this or any other case. For, a crucial and obvious element of the Board's practice is that it does not consider as part of the record the material being routinely acknowledged and made public. Since the material as to which petitioners complain was not taken into account by the Board, the proceeding was completely fair to petitioners and in no way vitiated.

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[13] E.g., Sangamon Valley Television Corp. v. United States, 103 U.S. App. D.C. 13, 269 F. 2d 221 (1959); WKAT, Inc. v. F.C.C., 103 U.S. App. D.C. 324, 258 F. 2d 418 (1958); Massachusetts Bay Telecasters, Inc. v. F.C.C., 104 U.S. App. D.C. 324, 261 F. 2d 55 (1958).

Petitioner TWA asserts (Br., p. 22) that, while an agency's assertion of non-consideration of ex parte material "might be relevant" where the material was properly received in connection with some other function or activity of the agency (citing Van Curler Bctg. Corp. v. United States, 98 U.S. App. D.C. 432, 236 F. 2d 727 (1956), cert. den. 352 U.S. 935; Eastern Air Lines, Inc. v. Civil Aeronautics Board, 271 F. 2d 752, 758 (C.A. 2, 1959)), the assertion must be rejected where the material is directed to the proceeding itself. But petitioner does not explain why such a distinction should be drawn, and clearly the disclaimer in the instant case is, if anything, entitled to even greater weight and unreserved acceptance. For, it is made in connection with a practice whereby the Board seeks to preclude improper approaches by making public the communications it receives. We submit that in those circumstances it makes no sense to argue, as petitioner does, that the Board's disavowal should be rejected and that the Board did, in fact, participate in improper approaches by considering these same communications.[14]

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[14] Apparently recognizing the anomaly of the above argument, United suggests (Br., p. 26) that the Board, while it may not have consciously considered these communications, may nevertheless have been unconsciously influenced. But even aside from the Board's assertion that the communications "are rarely even brought to the attention of any Board Member,

(footnote continued)

Further, the cases show that the courts have accepted the agency's disclaimer even where the material in question related directly to the proceeding. Thus, in Sanders Bros. Radio Station v. Federal Communications Commission, 70 App. D.C. 297, 106 F. 2d 321, 327 (1937), appellant charged that the agency received additional reports on the facts in issue from its staff to which it was not given access. This Court, however, accepted the agency's disclaimer that it had not considered the matter as part of the record, stating that "* * * the presumption of regularity of official conduct is controlling" (106 F. 2d at p. 327); and the Supreme Court affirmed this holding (309 U.S. 470, 478). See, also, N.L.R.B. v. Ford Motor Co., 118 F. 2d 766 (C.A. 9 (1941). We submit that where the agency is acting openly and publicly, as in the present case, its disclaimer must be accepted; otherwise, the presumption

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(footnote continued)
save for signature on the acknowledgment" (Tr. 5454), the argument has no legal merit, and would seriously undermine the presumption of regularity of official conduct under which the agencies must of necessity be permitted to operate. Thus, in every case, the agency, by the very nature of its duties and activities, is aware of many non-record matters pertinent to the proceeding (see Eastern Air Lines v. Civil Aeronautics Board, 271 F. 2d 752, 758 (C.A. 2 (1959)), or knows of material in its confidential files relating to the case (see Sanders Bros. Radio Station v. Federal Communications, 70 App. D.C. 297, 106 F. 2d 321, 327 (1937), reversed (but affirmed as to this specific point) 309 U.S. 470, 478. But the courts have not invalidated the agency proceedings on the ground of possible unconscious influence stemming from this extra-record knowledge. On the contrary, as shown by the cited cases, they have accepted the agency's disavowal of reliance on the particular material in question.

of regularity of official conduct would have little vitality.[15/]

The soundness of this conclusion and of the Board's procedure is further pointed up by the recent Congressional proposals on the subject. For as the Board pointed out (Tr. 5439, 5455), these proposals would prescribe for all agencies this same procedure which the Board has followed for so many years--that is, of placing all correspondence which the agency receives in a public file and ignoring such material in deciding the case. See, e.g., H.R. 4800, 86th Cong., 1st Sess.; H.R. 9549, 86th Cong., 2nd Sess. If the Board were following this procedure because of an express Congressional enactment, its disavowal of any consideration of the material would, of course, be accepted. We submit that the procedure when administratively devised is equally valid and the disavowal equally acceptable.

Petitioners argue (TWA Br., p. 21), if the procedure were the result of Congressional enactment (or as a consequence to an agency

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[15/] The state court decisions relied upon by TWA in support of this proposition (Br., p. 16) involved circumstances in which there was improper evidence admitted and where the state appellate tribunal held that improper evidence of such character as to be deemed prejudicial required a setting aside of the verdict even though the trial judge disclaimed any reliance thereon. There is authority the other way in the state courts (see 3 Am. Jur. "Appeal and Error" § 1038), and no citation of authority is required to support the proposition that there are many circumstances in which appropriate instructions to a jury to disregard evidence or extraneous considerations is sufficient to avoid prejudice. Here, the matters complained against were not in evidence at all. The prior decision by this court on which TWA relies (Tri-State Broadcasting Co. v. Federal Communications Commission, 68 App. D.C. 292, 96 F. 2d 564 (1938) holds merely that certain hearsay testimony should not have been admitted and that the court would not determine whether the other evidence supported the order until proper findings were made by the Commission.

rule-making proceeding), they would have been on notice as to the material in the public file, and would have had an opportunity to respond and rebut. But again the short answer to petitioners is that even assuming a complete lack of knowledge on their part as to the material with respect to this proceeding in the public correspondence file[16] and conceding that it would be more desirable to have an explicit statutory provision or rule delineating this practice (as the Board apparently contemplates as a result of the present dispute (Tr. 5455)), petitioners are not, in any real sense, injured by the lack of notice. For the Board's position here rests in the last analysis on the fact that it does not consider such correspondence. Clearly, a party has no need of notice in order to rebut a matter which has not been considered by the agency.[17]

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[16] It should be noted that the practice is a long-standing one, that such correspondence has been common to all route cases for years, and was undoubtedly "well known to the experienced practitioners representing petitioners" (Tr. 5439) (who, while they have denied knowing of the particular communications, have never asserted that they were unaware of the Board's correspondence file). Indeed, the Board expressly found that these charges, which were advanced for the first time on petitions for reconsideration, were tardy (Tr. 5457).

[17] In effect, the thrust of petitioners' arguments is that the Board must change its practice and accord parties an opportunity to respond to all matters received by the agency. Under this view the Board would, to a considerable degree, lose control of its proceedings, since whenever a letter from some member of the public or public official was received, all the parties would have to be accorded a reasonable period of time to be served and to prepare and submit comments thereon, and all such material (pro and con) would have to be considered by the Board. We submit that the Board's present practice is much sounder and in any event is well within its discretion. Cf. Federal Communications Commission v. Pottsville Bctg. Co., 309 U.S. 134 (1940). Petitioners' claim is analogous to an argument that this (footnote continued)

Petitioners stress that San Francisco and ~~United~~ American either sent or induced to be sent many of the communications in the public file, and assert that the question is thus whether parties are bound by an agency's established procedural rules for placing material before the Board for its consideration or have only a "qualified" duty to follow the rules. Of course, all parties are bound by the agency's rules. But the question here is not whether a party's violation of the rules against inducing pressure on the Board disqualifies or reflects adversely on him (considered in point 2, _infra_) but whether any such violation vitiated the proceeding because of the strict requirement of fairness and the appearance of fairness. In view of the foregoing discussion, it is clear that they did not. For, it makes no difference on this point that some of the communications from public officials or others which went into the public correspondence file were inspired by American or San Francisco (or indeed, sent by the latter party). If it is accepted (as we urge it must be) that the Board does not consider material in this file in deciding the case, it is immaterial whether the letter being politely acknowledged and then ignored comes from the public official voluntarily or as a result of a party's solicitation.

For the same reason (that whatever the source, the letters were not considered), petitioner TWA is incorrect in asserting impropriety

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(footnote continued)
Court could not properly set aside without consideration any communications it might receive from the public in connection with pending cases but, because of the possibility of unconscious influence, must adopt a practice of serving and giving each party an opportunity to file additional pleadings.

because many of the communications were sent by "influential political figures" (Br., p. 23). Further, petitioner seems to be suggesting that there is something both unusual and improper for public officials to show interest in new service matters. On the contrary, as the Board made clear (Tr. 5457), representatives of the area affected have always shown interest in new service proposals and have always favored such proposals. The instant communications, far from being unusual, thus "are merely corroborative of the Board's normal assumption in any route case that all public officials will favor new or additional air service" (Tr. 5457).[18/] Both the Board's rules (see Rule 14, p. 68) and court decisions (Eastern Air Lines v. Civil Aeronautics Board, 271 F. 2d 756, 760 (C.A. 2, 1959)) establish that no impropriety exists, *per se*, in congressional participation before the Board.

Similarly, the proceeding was not vitiated because of the December 2, 1957 conference with officials of San Francisco. Again, the meeting was not unusual nor was it a private meeting kept secret from the parties. The Board frequently meets with city representatives to discuss the air transportation problems and needs of their city. The December 2, 1957 meeting with San Francisco officials was such a meeting. The Board

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[18/] We have, in Appendix A, *infra*, p. 55, exhaustively analyzed the public correspondence in order to show that the proceeding involves none of the type of covert activities found or charged in the cited F.C.C. cases. That analysis discloses the communications were typical of those expected to be received from third persons and civic interests and that they were neither intrinsically objectionable nor more than corroborative of the Board's "normal assumption" that all public officials and civic bodies will favor new or additional air service (Tr. 5457).

immediately published the transcript of the meeting, and stated that the transcript is "available to interested persons as a public document" (Tr. 5448). As the Board properly points out, any possible prejudice was thus cured, since the parties were thereby given the opportunity "to rebut San Francisco's remarks by the filing of appropriate papers" (Tr. 5448). But in any event, the San Francisco meeting cannot be held to vitiate the expedited proceeding which the Board began by its order of January 13, 1958. Prior to that date, the Board was simply considering whether to go ahead and hold a hearing on whether additional service should be authorized and if so, to whom. Therefore, even if it be assumed that some error were committed in reaching the decision to hold a hearing, this would be irrelevant to the real issue, namely, whether the Board's actions _in the hearing which was held_, both as to procedure and the merits, are correct. We have shown that petitioners were accorded a full and fair hearing on the question of whether additional service should be authorized.[19] See _Phillips_ v. _Securities and Exchange Commission_, 153 F. 2d 27 (C.A. 2, 1946), _cert._ _den._ 328 U.S. 580.

We submit therefore that the Board, in relation to this point, correctly found no threat, real or apparent, to the integrity or impartiality of its processes (Tr. 5457). Its procedures were fair and satisfied the "appearance of fairness" (_cf._ _In re Murchison_, 349 U.S. 133, 136 (1955)).

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[19] Similarly, over 80% of the communications which were received and placed in the public correspondence file were concerned with the question of holding an expedited hearing, and thus, on this ground also, cannot be deemed to have vitiated the proceeding.

If the instant proceeding must be redone in its entirety because of the receipt of the material here described, then every significant licensing proceeding in any field over the past years has been improperly conducted and, if still pending, must be reversed or reopened.[20]

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[20] We are informed that the following agencies have followed and now follow much the same procedure of acknowledging letters from the public and placing them in the public docket (but not serving them upon parties or taking them into account in deciding the case): Interstate Commerce Commission, Federal Communications Commission, Federal Power Commission.

2. The Board did not err in refusing to withdraw the award to American or in not ordering further hearings

While petitioners make much of the fact that the Board found violations of the principles of practice here, their chief claim in this respect is for vitiation of the entire proceeding. But unless the Board was rendered incapable of a fair decision thereby, the question is one of penalty. The Board was rather plainly not disqualified, and in our view, the principal question was whether the Board should have withdrawn the award as a sanction. We think the Board obviously correct in its view that, in the circumstances of this case, there was no warrant for penalizing the traveling public and American for overzealous conduct on the part of San Francisco. Also, of course, the fact that violations were involved is not nearly so clear as petitioners represent.[21]

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[21] Neither the Board's regulations nor existing ethical concepts possess that degree of clarity urged by the petitioners in the narrow factual area here involved. Indeed, if the rules of conduct were settled to the extent contended by them, there would be no point in the numerous inquires and discussions in legal and Congressional circles as to what should be the proper standards. The Board's regulations do not define when a "proceeding" is in being for purposes of its principles of practice, what constitutes a communication on the "merits," or the extent to which solicitation of participation under its rules by third persons is permissable or to what degree an interested person may "take his case to the public." (Tr. 5440-5443). To be sure, fraud, corruption, and clandestine conduct are prohibited apart from specific rules. But there are no such matters here, and the subjects of just when and what communications should be permitted, what should be done with the inevitable communications and inquiries from the public, and the like, are all the subject of current debate with varying solutions being offered. For example, there is considerable controversy at the moment as to just when the ban against *ex parte* communications should arise. In this connection, the Celler report on Federal Conflict of Interest Legislation (Straff report to the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 2d Sess., December 30, 1958. p. 69) would apply the ban to a contested

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As to American, the only violations found related to the three letters from travel agents sent at the urging of American employees prior to the formal institution of the proceeding when, as previously noted, it was far from clear that a violation would result therefrom. Certainly the Board was entitled to infer that any deliberate pressure campaign on the part of American's management would have brought greater results in this area. Similarly, there was no showing of causal relationship between American and any other communications received by the Board, or that American had prodded San Francisco into addressing or inciting any communications to the Board outside the framework of the Board's procedural rules. In sum, there was nothing in the facts alleged which demonstrate any error in the Board's determination that a penalty against American was unwarranted and that its conduct had not been shown to be disqualifying.[22/]

TWA also suggests that the Board should have ordered further procedures to inquire into its charges, rather than disposing of the matter on the factual allegations involved.[23/]

(footnote continued)
proceeding "which has been designated for hearing." Similarly, H.R. 6774 would invoke the ban as such when the proceeding "has been noticed for hearing" (Section 206(a)(1) of the proposed admendment to the Federal Aviation Act). Further, the Board's prior rulings relating to the principles of practice appear to have been only in relation to proceedings actually in progress.

[22/] Determinations in this area are largely committed to the competence of the Board. E.g., Federal Communications Commission v. WOKO, 329 U.S. 223 (1946).

[23/] What was deemed established by the Board for purposes of its decision were the facts alleged by the petitioners, and not the inferences and opinions which they placed thereon. See, e.g., Equitable Life Assurance Society v. Brown, 213 U.S. 25, 43 (1908); Int. Com. Comm. v. Goodrich Transit Co., 224, U.S. 194, 204 (1912); Southern Pac. Co. v. Railroad Commission, 193 Fed. 699, 703,704, (N.D. Calif., 1912).

But until the issue went against them, petitioners were content to have the Board decide this case on the pleadings, stating that hearings would establish only the facts alleged or cumulative ones. Also, despite their protestations to the contrary, the claims of improper conduct and a need for further hearings were belated ones made in an apparent last ditch attempt to stave off competition.[24/] Further, as the Board's Opinion reveals, the facts called for over-all clarification of the Board's rules and procedures, rather than penalty action in the light of the various uncertainties involved.

Finally, on this point, the Court's attention is invited to the statement of the Department of Justice (infra, p.52) that, in the Department's view, the Board should have inquired further into American's conduct. Board Counsel believe, as the Department itself seems aware, that the Sangamon case is readily distinguishable from the instant situation and indeed the Department concurs in the view that Sangamon is inapposite in relation to petitioners' claim that the Board's proceeding was vitiated. Board Counsel are aware of no case requiring a further hearing to vindicate the integrity of the deciding tribunal in circumstances such as are here

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[24/] The claim that their charges were inappropriate at any time does not bear scrutiny on the facts of this case. Bridges v. Wixon, 326 U.S. 135 (1945), involved proper evidence before a hearing officer objected to before decision both by the Board of Immigration Appeals and the Attorney General. The F.C.C. cases also appear to have involved circumstances in which the facts were unknown until after the agency's decision, and the facts brought out by the Harris Committee were far different from those here involved. There is here no issue of fraud or corruption, and in any event the Board's refusal to inquire further rested not so much on the untimeliness of the claim as the absence of any showing of facts demonstrating disqualifying misconduct.

involved. The Board fully subscribes to the view that the integrity of the administrative process should be sustained, but it found no need for further proceedings for that purpose here (Tr. 5457). The facts of this case simply do not support the Department's position. Whether it was desirable that the Board hold further proceedings is a matter within its discretion, and Board Counsel submit there was no abuse of discretion on the Board's part.

B. The Board did not err in refusing to make the staff report available to petitioners

Petitioners suggest that they were entitled to the Board's staff report for purposes of cross-examining the Bureau's witness who appeared in the proceeding as to the matters to which he testified (TWA brief, p. 22). But his testimony and the Bureau exhibits which he sponsored involved only undisputed factual data (unprinted transcript, pp. 3529-3633), and there was no suggestion of need for the report as a basis for cross-examination of Mr. Williamson. Rather, counsel for TWA stated that his questions to the Bureau employee were "just laying the ground work for the subpoena" (Tr. 2022) addressed to other Bureau employees (Tr. 2023), and he apparently acquiesced in the examiner's characterization of the subpoena as an "attempt to go back of the Board's action that it took originally in assigning this case for hearing" (Tr. 2024). Further, there is no claim that the Board's orders assigning the case for hearing do not set forth valid reasons therefor. See Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 145 (1947); Hammond v. Hull, 76 U.S. App. D.C. 301, 131 F. 2d 23, 28 (1942).[25]

Thus, what is here involved is essentially an attempt to inquire into the motives and views of government officials in taking action or to ascertain what may have been before them in the way of staff advice and recommendations in relation to their action. This Court recognized in North American Airlines v. Civil Aeronautics Board, 100 U.S. App. D.C. 5, 240 F. 2d 867 (1956) that "staff studies, internal departmental memoranda, and recommendations of Board experts to its members ordinarily are not subject to discovery." See, also, Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl., 1958).

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[25] There also was no compliance with the Board's Rule 19(g) (infra, p. 69) with respect to this matter.

Petitioners attempt to avoid this principle by characterizing the Bureau of Air Operations as an adversary party, and claiming that the appearance of the Bureau in the case waived any privilege which otherwise might have existed. But the Bureau is not a "party" in the usual sense of the term, but rather is a component of the Board charged with the duty of developing an adequate record. The fact that it may "take a position" in a new route case does not alter the situation.[26] Neither should the Bureau's position here have come as any surprise since it had theretofore supported American's position in the Denver Service Case (see supra, p. 3).[27] Here, there can be no valid calim of any denial to or need for economic facts (see Kaiser, 157 F. Supp. at p. 947), but only the claim that the Bureau may have taken inconsistent positions. The contentions here advanced are substantially the same as those in North American and Kaiser, and are no more meritorious.

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[26] The case is wholly unlike that which exists where the government is a suitor or defendant in the courts. The Board has no choice but to entertain certificate applications, and hence may not elect either to reveal or to forego prosecution or have judgment entered against it. See Petition of Boeing Airplane Company, 23 F.R.D. 264 (D.C.D.C., 1959), much relied upon by petitioners. Even there, Judge Holtzoff distinguished between documents submitted by the Air Force and documents prepared by the Renegotiation Board, requiring the production of the former but not the latter. Also, Mr. Justice Reed in the Kaiser case, supra, recognized a privilege against staff reports containing recommendations even in judicial proceedings to which the government is a party unless there is a "need for production of the documents to establish facts" (157 F. Supp. at p. 947).

[27] The Board's orders do not rest on the position of the Bureau of Air Operations, or other staff components, but rather are to be judged in the light of the findings and evidence of record. See Lake Central Airlines v. Civil Aeronautics Board, 100 U.S. App. D.C. 106, 239 F. 2d 46 (1956).

C. There was no deprivation of due process because Member Hector did not hear oral argument; because of the time allocations for argument; or because of the Board's press release

In Sisto v. Civil Aeronautics Board, 86 U.S. App. D.C. 31, 179 F. 2d 47 (1949), this Court held that a member of the Board who did not hear oral argument nonetheless could participate in the decision in that in "the plain words of the statute the Board may 'hear or receive' argument." (Section 1004(a), infra, p. 64). See, also, McGraw Electric Co. v. U.S., 120 F. Supp. 354 (E.D. Mo., 1954), aff'd 348 U.S. 804, for a similar holding in relation to the Interstate Commerce Commission. The case of W.I.B.C. v. Federal Communications Commission, 104 U.S. App. D.C. 129, 259 F. 2d 941 (1958), is inapposite, in that the statute there involved required the Commission to "hear" oral argument on request. 47 U.S.C. 409(b).[28] There is no suggestion that Member Hector did not consider the transcript of the argument, and the Board's opinion affirmatively recites consideration of the "arguments advanced on briefs and in oral argument" (Tr. 4732).

28/ 47 U.S.C. 409(b) provides in pertinent part:

> ". . . In all such cases [in which an initial decision is prepared] the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions . . ."

As to the time allocations, United (Br., p. 10) includes in the computation the time allocated to Congressional appearances as that allotted to opposing interests (see Tr. 5139).[29] A sufficient answer to the contention that United should have been given more time because of these appearances is found in the recent rejection by the Second Circuit of a similar claim. Eastern Air Lines v. Civil Aeronautics Board, 271 F. 2d 752, 760 (C.A. 2, 1959). Insofar as the other parties are concerned, there is no rule requiring absolute equality of time. United has failed to show that the time allocated to it was insufficient for an effective presentation (it convinced two members), but rather appears to insist upon an absolute equality rule.

As to the press release (Tr. 4729), contentions of deprivation of due process by reason of similar Board announcements of its tentative votes prior to release of the formal opinion were expressly rejected in Eastern (271 F. 2d at p. 758), and sub silentio by this Court in Delta Air Lines v. Civil Aeronautics Board, C.A.D.C. Nos. 14,798 et al., decided December 10, 1959.

29/ The two applicants, American and Northwest, were allotted 40 minutes each and the two defending carriers, TWA and United, 30 minutes each. Three intervenors, San Francisco, Oakland and The Port of New York Authority, were allotted 10 minutes each. Bureau counsel was given 30 minutes. These allocations were within the normal ones utilized by the Board. Moreover, there was here involved only "the designation of the operator of a new air route. No deprivation of property rights, no regulatory proposal, no maximum of rates or fares, is involved." United Air Lines v. Civil Aeronautics Board, 81 U.S. App. D.C. 89, 155 F. 2d 169, 172 (1946).

D. There was no error in the adoption by the Board of the examiner's report

TWA contends that the examiner's report was defective in that it did not recite TWA's various contentions and hence did not "crystallize the issues and . . . furnish the agency finally responsible for the decision with the views of all parties with respect thereto" as intended by Section 8 of the Administrative Procedure Act (Br., p. 29). While we think the report adequate,[30] that point is unimportant since it is the Board's order that is challenged and TWA recognizes that any defect in the examiner's report could be cured by the Board's opinion (Br., p. 29).[31] However, says TWA, the Board relied in part on the examiner's decision, and the contention is that the Board should have acted *de novo* on all the issues. But the Board did act on all issues urged to it, and the fact that it adopted certain of the examiner's findings did not make the decision any the less its own. Agencies may properly decide their proceedings (including the disposition of exceptions) through incorporating the examiner's decision and adopting his findings as their own

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[30] The examiner's references to TWA are not restricted to Tr. 4107. On the contrary, he appears to have discussed the carrier's position on all issues which he deemed material to his decision (See Tr. 4098-4100, 4119, 4122-4123, 4128, 4129, 4131), and Section 8(b) *infra*, p. 65 does not require findings on other than "material" issues. *Minneapolis & St. Louis R. Co.* v. *U.S.*, ___ U.S. ___, 80 S. Ct. 229, 241 (1959).

[31] The effect of Section 8(b) was not to require a letter perfect examiner's decision as a prerequisite to valid agency action. See *Aero Mayflower Transit Co.* v. *United States*, 95 F. Supp. 258, 263 (D.C. Neb., 1951); *cf. Sisto* v. *Civil Aeronautics Board*, 86 U.S. App. D.C. 31, 179 F. 2d 47 (1949).

(NLRB v. State Warehouse & Cold Storage Co., 193 F. 2d 156, 158 (C.A. 9, 1951)), and this Court is well aware of the Board's practice in this respect. See, e.g., North American Airlines v. Civil Aeronautics Board, 97 U.S. App. D.C. 85, 228 F. 2d 432 (1955). There is no showing that any material contention was overlooked here, and no more is required. Minneapolis & St. Louis R. Co. v. U.S., ___ U.S. ___, 80 S. Ct. 229 (1959).

II. The Board's order rests on adequate findings supported by the record, and it did not err in denying United's motion for further hearing

A. The Board's findings are adequate and supported by substantial evidence

The challenges to the substantive merits of the Board's order rest largely on the over-all contentions that competition was neither here warranted nor economically feasible, and that the Board's findings in these areas are inadequate and without the support of evidence in various particulars.

The short answers to these contentions are that (1) where there is sufficient traffic the Board is entitled to certificate an additional carrier on the basis of its regulatory experience that competition results in public benefits by insuring good service and maximum traffic development,[32] and (2) the San Francisco-New York market is one of the most lucrative in the nation and rather obviously can support multi-carrier service since all comparable markets (and many smaller ones) are doing so (Tr. 2407, 2418, 2423). Moreover, the petitioners' contentions overlook the fact that American's assigned role has long been one of a competitor in the market involved, and that "the award of nonstop rights to American constitutes another adjustment in the carrier's route structure necessitated by still further technological advances in trunkline equipment in order to permit continuation of a third transcontinental service between San Francisco and New York" (Tr. 4736-4737). Hence, the issue was not only whether there should be additional competition, but also whether the competition theretofore intended and provided should be continued in the light of the trend to nonstop operations for long-haul services.[33/]

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[32] See Eastern Air Lines, Inc. v. Civil Aeronautics Board, 271 F. 2d 752, 759 (C.A. 2, 1959) where the Court, in reliance on F.C.C. v. RCA Communications, 346 U.S. 86 (1953), held

> "The Court there indicated that an agency's determination that competition in and of itself was a desirable objective would be upheld provided that the agency based its determination upon its own expert knowledge of the industry under its control rather than on some general notion of national policy. In the present case the Board did determine that increased competition on air routes was desirable when there was sufficient traffic. Therefore, further findings with respect to inadequacy of service, or benefits to be derived from competition, are unnecessary."

See, also, Delta Air Lines v. Civil Aeronautics Board, C.A.D.C., Nos. 14798 et al., decided December 10, 1959, p. 24 of slip opinion.

The corollary to the above proposition well recognized in other case law, is that, prior to authorizing competitive service, the agency (footnote continued)

Here, the Board did determine that increased competition would bring public benefits (Tr. 4128, 4130-32 (footnote), 4747), in the

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(footnote continued)
is not required to first afford the existing carriers an opportunity to improve their services or to find such services to be inadequate in the sense that an order compelling more service would be justified. See, e.g., I.C.C. v. Parker, 326 U.S. 60, 69-70 (1949); Norfolk Southern Bus Corp. v. United States, 96 F. Supp. 756, 760 (E.D. Va., 1950), aff'd 340 U.S. 820 (1950); F.C.C. v. RCA Communications, Inc., 346 U.S. 86 (1953); Kentucky Natural Gas Corp. v. F.P.C., 159 F. 2d 215, 218 (C.A. 6, 1947); Delta Air Lines v. Civil Aeronautics Board, 247 F. 2d 327 (C.A. 5, 1957).

[33/] United suggests (Br., p. 17) that American had a much smaller participation in the market than that found by the Board (Tr. 4737). However, United's computation (Tr. 3419) rests on traffic transported wholly by American, whereas the Board considered that traffic carried by American through connecting service with other carriers also should be considered (Tr. 4753, see Tr. 2361).

precise manner that it did in the recent Eastern and Delta cases cited supra, note 32. Further, again as in those cases, the Board pointed out affirmative deficiencies in the prior service. Those deficiencies were not only for a limited period in early 1957 as petitioners contend. Rather, the Board found that TWA "had never matched either the quantity or quality of United's service" (Tr. 4746), and the Board reviewed the past pattern of operations in some detail in terms of schedules and traffic (Tr. 4745-46, see also Tr. 4091-4093, 4109, 4111, 4129).[34] Further, there is ample other evidence of record to show that the services did not fully meet the needs of the traveling public.[35]

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[34] Since the underlying data referred to by the Board is undisputed, we have not designated it for reproduction in the joint appendix.

[35] Various witnesses testified generally that nonstop space was difficult to procure, or unavailable unless request therefor was made several days or more than a week in advance (Tr. 846-847, 849, 867-869, 871, 954, 956, 988, 1032). In addition, it was testified specifically that similar deficiencies existed during the first six months in 1958 (Tr. 853-854, 875, 1036), and a survey conducted in the latter part of 1957 revealed extreme difficulty in securing tourist accommodations (Tr. 1062, 2213, 2266).

Moreover, in relation to the type of service being provided elsewhere, the record shows that in relation to the traffic involved, the service in the New York-San Francisco market has always been far below that provided for New York-Los Angeles (Tr. 2458, 2460, 2462, 1229-1230; also see, 2165, 2168, 2171, 2174, 2177, 2179), and that during the period 1954 to 1957 there was an average lag of over 5000 available seats per month in the New York-San Francisco market (Tr. 2762, 1233).

The load factors in these two markets, prior to the sharp increase in service between New York and San Francisco in 1957, were also significantly at variance. The New York-San Francisco standard fare flights experienced an average load factor in excess of 80% on over 22 of the days surveyed, while New York-Los Angeles did not experience such high load factors at any time (Tr. 2753, 1234-1235), the same analysis applied to coach nonstop traffic revealed a 40% difference between the two markets (Tr. 2755, 1235).

Also, the carriers appear to concede that their 1957 services left much to be desired, and substantially increased their operations after the motions for early hearing had been filed. As the Board found (Tr. 4746), equipment shortages subsequently alleviated did not supply the basic answer to this increase. Rather, as the record shows, the carriers had been able to operate more flights in other markets such as the New York-Los Angeles one where there was multiple competition (Tr. 2475-2488, 2345), and as the examiner noted (Tr. 4115) the petitioners did not make such increases in their other major markets when the alleged equipment shortage had been overcome (Tr. 2190). And while they now promise more service for the future, the Board was not required to accept those representations. See cases cited supra, note 32.[36] On the contrary, in a sufficient market, the Board may certificate upon the basis of its informed experience that competition is the best guarantee of fully adequate services and further traffic development.

Petitioners further assert that competition is not economically feasible on the basis of the Board's traffic forecast of 366,000 passengers annually by 1960, with more to come in succeeding years.[37] But that assertion rests on contentions that the carriers will all initially overschedule in the off-season. Neither the Board nor the examiner saw any reason why this should occur, and particularly since seasonal variation in scheduling has been observed in the past in this market (Tr. 4091, 4105, 4124, 4741-44). Moreover, there is no reason to believe that the public will be required to bear the expense in terms of fare increases for any overscheduling in which the carriers may engage (United's brief, pp. 39-40), nor did the Board's statement that carriers are expected to operate in the light of traffic considerations constitute an attempt to control schedules contrary to the provisions of Section 401(e) (*infra*, p. 63).[38] These arguments are very similar to the Eastern ones advanced to and rejected by this Court and the Court of Appeals for the Second Circuit in the *Great Lakes* and

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[36] The Board normally places little reliance on service improvements made after a threat of possible competition (e.g., Denver Service Case, Order E-9735, Nov. 14, 1955; New York-Chicago Service Case, Order E-9737, Dec. 1, 1955; Great Lakes-Southeast Service Case, Order E-13024, September 30, 1958; St. Louis-Southeast Service Case, Order E-13026, September 30, 1958. Also, the Board has long held that ability to increase service does not "in itself constitute a bar to the authorization of a competitive service. Otherwise, no competition would ever be authorized for there is no limit to the extent to which an existing carrier could expand services to meet increased demands." Milwaukee-Chicago-New York Restriction Case, 11 C.A.B. 310, 330 (1950).

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[37] They also suggest that the 1960 forecast is improper (United's brief, pp. 15-16). The Board and the examiner considered the problem of the "common fare" New York-San Francisco/Los Angeles passengers and the "excursion traffic" in determining the traffic volume (Tr. 4089-90, 4738-39), pointing out, *inter alia*, that United's own estimate based on 1957 data closely approximated that of the examiner. The Board also fully considered the contention that the forecast was inaccurate because the 1958 figures showed a decrease was due to the general business recession and that there was no reason to believe that the general normal 10% growth would not occur over the entire period of time involved. This is an area in which the Board is entitled to make predictions. For the basic data involved, see Tr. 3537, 3633. Also, in point of fact, the over-all traffic growth in recent months has exceeded all expectations, as previously shown in relation to the petitioners' request for a stay herein.

[38] Neither United nor the dissenting members explain how the diversion here involved constitutes any over-all loss to the industry, or why fares would have to be raised as a result. Actually, fare levels are affected by many considerations, one of which is the tendency toward uniformity for competitive reasons, and these petitioners already enjoy an advantage in this respect in the light of their far flung routes and relative superior financial strength.

St. Louis cases that, since Eastern intended to provide more service, other carriers could not be certificated. Also rejected in those cases was the contention that the imminence of jet operations precluded new certification.

Moreover, the petitioners approach the problem from the standpoint of only the present, whereas the Board's action here was also to serve the future public convenience and necessity. Here, the Board's finding was of increasing growth, that operations could be conducted at better than breakeven load factors in 1960, with more profitable operations after that (Tr. 4743-44). They also ignore the fact that the San Francisco-New York market is one of the largest in the nation, that all comparable markets and many smaller ones now have multi-carrier competition (Tr. 4112, 2418, 2423), and, at the moment, that there is jet competition in several of these markets. These facts of course are not conclusive on the point, but they nonetheless show that the Board's action here was consistent with its established standards, that the industry has prospered under multi-carrier competition, and that, as the Board found here, there is no reason to believe that any different result will occur from this certification (Tr. 4750).

The Board made estimates of the revenue diversion from petitioners (Tr. 4787), and fully considered its effect on them (Tr. 4747-4750). It found that the petitioners were in a period of increasing earnings; that the revenue diversion was gross revenue and not profit (Tr. 4748); and that, because of ever increasing traffic growth, they would receive more gross revenue in 1960 with additional competition than they had received in 1957 (Tr. 4749). The ultimate finding on this point was that the petitioners would not be seriously affected (Tr. 4749). In sum, the Board weighed the competitive impact against the benefits of the new service, and found that the service here was warranted.

Petitioners contend that these various findings were not enough. Rather, say they, the Board was required to make precise estimates of operating costs, anticipated load factors for 1960 and beyond; the net revenue diversion from the petitioners and its impact in terms of over-all net system revenues; and the rate of return which petitioners would receive on investment from the nonstop operations viewed in isolation (which also would have entailed an allocation of costs to the nonstop services). Petitioners cite no authority in support of these propositions.[39] In American Airlines v. Civil Aeronautics Board, 87 U.S. App. D.C. 365, 192 F. 2d 417 (1951) this Court held that the Board was not required to make precise estimates of the type here contended for, and, in subsequently rejecting a similar contention, held that it was enough if the basic findings are made with "sufficient elaboration to enable the court to relate the evidence to them." Lake Central Airlines v. Civil Aeronautics Board, 100 U.S. App. D.C. 106, 239 F. 2d 46 (1956). See, also, Minneapolis & St. Louis R. Co. v. U.S.,

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[39] We do not read Clarke v. United States, 101 F. Supp. 587 (D.C. D.C., 1951) as imposing any requirement that an agency make findings of rate of return on either an over-all or a segmented basis for the operations of carriers such as are here involved as a prerequisite to certification of additional service, and United in so contending advances a new and novel theory. In that case, there were no findings at all as to the impact of the Commission's action on Atwood, and the market was a marginal one. Here, the route is among the most lucrative in the nation.

___ U.S. ___, 80 S.Ct. 229 (1959).[40/] Here, the Board's finding of average anticipated load factor (Tr. 4743) rests on simple arithmetic based on 1000 daily passengers and 112-seat aircraft, and the finding of breakeven load factor (Tr. 4743) refers to the cost evidence on which it was based which in turn supports the finding.[41/] And while

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[40/] Such contentions also have been regularly rejected without comment in various Board cases. The most recent such cases, as here, involved contentions of impact by reason of jet operations and the claim that the existing carrier would supply more service than was needed with the larger equipment. Eastern Air Lines v. Civil Aeronautics Board, 271 F. 2d 752 (C.A. 2, 1959); Delta Air Lines v. Civil Aeronautics Board, C.A.D.C., Nos. 14798 et al, decided December 10, 1959.

[41/] The basic cost exhibit for Boeing 707 jet operations was one submitted by American (Tr. 2529 to 2538), and the carrier also computed its allocated costs from this data to be $3.041 per plane mile (Tr. 2806). The 54.3% breakeven load factor generally accepted throughout the Board's proceeding was reached on the basis of an average yield of 5¢ per passenger mile as applied to the $3.04 cost per plane mile, or 60.8 passengers for a load factor of 54.3% on the basis of 112 seats in the aircraft. The 5¢ passenger-mile yield in turn was computed on the basis of average yield for coach and first-class passengers (50% in each category) after an allowance for round-trip discounts (Tr. 2530). The Board's Bureau of Air Operations (unprinted transcript, p. 4025) computed the 707 costs to be $2.96 per plane mile by eliminating the 5% margin for contingencies included in American's estimate of direct costs (Tr. 2529). Also, since the round-trip passenger discount had then been discontinued, the Bureau utilized a 5.24¢ yield per passenger mile, and concluded that the breakeven load factor would be 50.5%, or 56.5 passengers. The Board accepted the higher American estimate. Both of these load-factor estimates, it should be noted, do not include cargo and mail to be transported but rather proceed on the assumption that all revenue would accrue from the passenger service.

Computed on the basis of "ramp hours" (i.e., time of departure from one ramp to time of arrival at another), American's estimated direct flying costs (flight expense, maintenance and depreciation) were $952.64 per hour. Its form 41 reports for the first six months of 1959 (submitted prior to the Board's decision) showed the experienced costs per revenue ramp hour to have been $936.96, or some $16 per hour less than the estimate. It also may be stated that the costs per revenue ramp hour for the first nine months of 1959 (the most recent data at the time of the (footnote continued)

United says that the Board should have dealt with and refuted United's contention of loss operations, the Board did so (Tr. 4742). Not only did it make the findings heretofore stated, but the Board also pointed out that United's estimates were based on traffic forecasts and anticipated overscheduling which the Board rejected. Further, the Board made reference to the petitioners' financial position based on identified reported data included in the record (Tr. 4748).[42] The Court

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(footnote continued)
preparation of this brief) are shown by the carrier's reports to have been $859.20, about $100 below the estimate. Also, as noted, the foregoing figures are in terms of revenue hours, i.e., the time operated in commercial service. During this initial period, there were numerous training hours flown. The costs of total 707 operations, revenue and non-revenue, were $761.22 per ramp hour for the six months' period ending June 30, 1959, and $750.28 per ramp hour for the nine months' period ending September 30, 1959. Much of this training time will not be subsequently required, and hence the future costs of revenue hours can be expected to decrease.

Interestingly enough, United asserts (Br., p. 32) that the evidence which it wished to adduce (speculation as to future cost trends) "was more significant than any information contained in the Forms 41." In sum, while United asserts in other contexts that actual experience should be the sole criterion, it departs from that position when confronted with such experience.

[42] The period referred to by the Board were the twelve-month periods ending April 30, 1958 and April 30, 1959. The undisputed figures are as follows:

	1958		1959	
	Gross domestic revenues -	Net domestic operating income	Gross domestic revenues -	Net domestic operating income
United	$277,433,859	$13,374,567	$318,135,858	$35,854,843
TWA	$204,125,200	$-7,033,277	$222,926,243	$14,546,925

is not left to guess on any material point, the Board's findings spell out a rational basis for its action, and the findings are related to and supported by the evidence.[43]

B. The Board did not err in denying United's motion to reopen the record

The principal contentions of error in the Board's refusal to reopen the record are that the evidence relating to costs was only manufacturer's data and that there was current evidence to show actual operating costs and trends which made the manufacturer's data unreliable.[44]

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[43] United asserts (Br., pp. 10, 11) that Members Gurney and Minetti acted inconsistently here in relation to prior cases, and that individual explanations hence were required by them. An examination of Member Gurney's dissent in the Great Lakes-Southeast Service Case (order E-13024) will disclose that he believed there was no need for additional service there, and he was of a contrary view here. Obviously, each case is to be decided on the basis of its own facts. Member Minetti's view in the Eastern Route Consolidation case (Order E-11184) was that there was no need for the certification of American for St. Louis-New York nonstop operations, and his statements concerning competitive dominance by American were made in that context. He there specifically favored the removal of certain restrictions from American to permit other nonstop services. Here, of course, the issue was largely whether American should be continued in, or eliminated from, the New York-San Francisco market. Also, we know of no principle which requires individual Board members to answer contentions that their action is inconsistent with prior action in other cases.

[44] The suggestion also is made that the Board's purpose in expediting the proceeding was to obtain information relating to the impact of jets, and hence that this purpose was aborted by the failure to reopen. But there is no suggestion that the Board intended to keep its proceeding open indefinitely, and it considered the evidence before it to be sufficiently representative. Further, the purpose of the Board's proceeding was to inquire into the needs for new services between New York and San Francisco in the light of the imminence of jet operations, which it did.

To the extent that petitioners are urging that the Board must await the eventuality of new equipment and a representative period of experienced operations before making an award (United's brief, p. 31), they are mistaken. The Board is entitled to act upon the basis of predictions for the future, and similar contentions by United have heretofore been rejected where the award rested on future traffic predictions and costs based on manufacturers' estimates for new equipment (then the DC-4 and Constellation). United Air Lines v. Civil Aeronautics Board, 81 U.S. App. D.C. 89, 155 F. 2d 169, 174 (1946). Here, the question is simply whether there was such a showing of significant new data as to require a reopening. We submit that there was not.

The Board found that the evidence before it was abundant and rested on extensive testing, and further that any evidence directed to a relatively short operating period would not provide any materially different or more reliable information than that already before it (Tr. 4751-4752). The question of what constitutes sufficiently representative evidence is of course a matter committed primarily to the Board (Illinois Commerce Commission v. U.S., 292 U.S. 474 (1934)) and it is well understood in the industry that initial periods of new equipment operations are not truly representative. Further, there was nothing in United's allegations which showed any material change. The motion alleged (Tr. 4048) inter alia, that American had increased the crew complement of its jets, increased salaries were being paid, costs in any event were uncertain, and American and others were so stating in other proceedings, and the Board had yet other studies under way which would throw still more light on the problem. American responded (Tr. 4066), pointing out that it had included an added 5% contingency in its direct cost estimates to cover matters such as were relied on by United, and that its actual experienced costs revealed by current Form 41 data stipulated into the record showed its estimates to have been sound.[45/] Certainly it cannot be said that the Board abused its discretion in these circumstances, and that it was required to reopen "because some new circumstance has arisen, some new trend has been observed, or some new fact discovered," I.C.C. v. Jersey City, 322 U.S. 503, 514 (1944). On the contrary, as the Court recognized in the cited case, "there would be little hope that the administrative process could ever be consummated" if that were required. Here, there were no radically changed conditions or matters going to the essence of the Board's determination, and, as the Board found (Tr. 4752), further hearing would have achieved little but to insulate the petitioners against competition. Whether rehearings shall be granted is a matter resting within administrative discretion

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[45/] See note 41, supra, for an explanation of this data.

(United States v. Pierce Auto Lines, 327 U.S. 515, 535 (1946); I.C.C. v. Jersey City, supra), and there is no showing of an abuse of discretion here.

CONCLUSION

The Board's orders should be affirmed.

Respectfully submitted,

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The Department of Justice concurs in the foregoing brief except as to Point IA(2) insofar as it treats with the issue whether the Board was required to conduct a further inquiry into the allegations concerning the actions of American Airlines, and its responsibility for the actions of others, in connection with alleged violations of the rules of the Civil Aeronautics Board proscribing attempts "to bring pressure or influence to bear upon the members of the Board or its staff, . . . designed to influence the Board's judgment in the case."

In view of the findings and undenied allegations showing violation of such rules, we believe the Board was under an independent, affirmative duty to ascertain the extent of such violations and to preserve the integrity of its own administrative process by holding a hearing to determine all the relevant facts. Cf. Sangamon Valley Television Corp. v. U.S., 103 U.S. App. D.C. 13, 269 F. 2d 221. While the facts of the latter case may be distinguishable, the broad principles there enunciated appear to be applicable here. A determination that the case should be remanded to the Board for further hearing would not, in our view, require a setting aside of American's certificate authority pending such a hearing. See Sangamon, supra.

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APPENDIX A

ANALYSIS OF THE LETTERS IN PUBLIC CORRESPONDENCE FILE

There were a number of letters received from private citizens during the course of the proceeding, either complaining of the existing service or generally supporting more, which apparently are not objected to save to the extent that two of them were referred to the Board by Senators as "constituent" letters.*/ An examination of the travel agency communications will also disclose that, apart from the question of their incitement, they were innocuous and not different in kind from the communications from the private citizens.**/ There were also numerous resolutions by Chambers of Commerce and municipal and county bodies in California which were adopted in 1957 generally favoring an expedited hearing and more service, many of which called for their presentation to the Board and to the California Congressional delegation. These again represent typical and expected action by such bodies (see, *e.g.*, Tr. 170, 171 where the San Leandro Chamber of Commerce submitted resolutions in relation to both this proceeding and the *Dallas to the West Case*). And all but a few (Tr. 532, 547, 558) were received prior to the Board's initial denial of the American motion on June 28, 1957.*/ Many of the documents were transmitted directly to the Board; others were sent in by members of Congress or Mayor Christopher of San Francisco

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*/ Letters in this category sent directly to the Board appear at Tr. 355, 419, 457, 216, 230-233, 235, 344, 351C, 351D. Another was transmitted by Senator Pastore (Tr. 533-535); and yet another by Senator Keating (Tr. 324-325).

**/ Of these, three were directly to the Board prior to the initial denial of American's motion for expedited hearing, and are the ones found to have constituted a violation of American of the principles of practice in the light of petitioners' affidavits that American inspired them. Andrews Travel Agency (Tr. 115); Travel Advisors (Tr. 361); Charles Travel Service (Tr. 400I). A telegram from Contra Costa Travel Service to Congressman Baldwin was transmitted to the Board on May 23, 1957 (Tr. 375, 376), and this too was found to be objectionable conduct on the part of American. There were five communications to members of Congress from travel agents in 1959 which the Board also was willing to impute to American but found not to constitute violation of the principles of practice. These were from Rona Travel Service and Conn Travel Bureau transmitted by Senator Case (Tr. 251-252, 330-331); from World View Tours transmitted by Representative Derounian (Tr. 258-259); from Manno Travel Agency transmitted by Representative Addonizio (Tr. 260-261); and from Penthouse Travel Center transmitted by Representative Rooney (Tr. 266-267). These latter two communications were returned to the Congressmen.

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*/ Such resolutions were from the following Chambers of Commerce or similar organizations:

San Rafael (Tr. 42, 394); Belmont (Tr. 42A); Vallejo (Tr. 43); Burlingame (Tr. 117); Alameda (Tr. 118, 352, 433, 475); Oakland (Tr. 166, 385); Sacramento (Tr. 355A & B, 440); Sunnyvale (Tr. 356); San Francisco Labor Council (Tr. 364); San Francisco (Tr. 365,384); Stockton (383); Mill Valley (Tr. 400J, 438); San Jose (Tr. 400K-I, 477); Berkeley Manufacturers Association (Tr. 456A); Downtown Association of San Francisco (Tr. 388); San Leandro (Tr. 127, 127A, 169, 170, 481, 482); Richmond (Tr. 131, 526, 527); San Carlos (Tr. 462); Palo Alto (Tr. 463); Millbrae (Tr. 464-465); Hayward (Tr. 466-467); Washington Township Industries (Tr. 408A); San Mateo (Tr. 532); Redwood (Tr. 547). See, also, the request of the San Francisco Labor Council of Nov. 27, 1957 (Tr. 558).

The resolutions from the municipal and county groups were as follows:

County of Alameda (Tr. 66-67) (served on petitioners); The Port of New York Authority (Tr. 68-70) (served on petitioners); County of Napa (Tr. 98A-B); City of Stockton (Tr. 116); County of San Joaquin (Tr. 116A-B); City and County of San Francisco (Tr. 366, 393, 398). County of Yolo (Tr. 400C-E); County of Santa Cruz (Tr. 400F-H, 449); City of San Jose (Tr. 395, 439); County of Santa Clara (Tr. 451); County of Sonoma (Tr. 389-390); County of Salona (Tr. 391-92); County of Marin (Tr. 396-397); City of Hayward (Tr. 128, 525).

(Tr. 475, 440, 438, 477, 388, 393, 449, 395, 439, 390, 391, 396). Many indorsed American, others indicated no choice of carrier (Tr. 42, 365, 463, 464-65, 532, 547). A number of these interests thereafter appeared at the hearing under Rule 14 in support of more service.*/

There also were letters from the then Governor (Tr. 379) and Lieutenant Governor (Tr. 363) of California in May, 1957 requesting an early hearing, and various letters by Mayor Christopher.**/ A joint resolution by the California legislature was adopted on June 7, 1957 and transmitted to the Board on June 17, 1957 supporting an early hearing and indicating a desire for a third nonstop service (Tr. 490-493). A subsequent resolution favoring a third carrier was adopted in 1959 and transmitted to the Board (Tr. 310, 312), and a copy sent to the President was referred without comment to the Board by a member of the White House staff (Tr. 313-316). This resolution was read at the oral argument by Congressman Johnson (Tr. 4534, 4537-38). The other White House communication which petitioners characterize as improper was a routine referral in November, 1957 by

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*/ Hayward (Tr. 3636); Berkeley (Tr. 3639); San Mateo (Tr. 3646); San Carlos (Tr. 3650); Santa Clara (Tr. 3656); Stockton (Tr. 3683); Marin (Tr. 3694); San Jose (Tr. 3697); Redwood (Tr. 3705); San Rafael (Tr. 3663); Sacramento (Tr. 3671); Sonoma (Tr. 3675); Vallejo (Tr. 3690); Palo Alto (Tr. 3701).

**/ Mayor Christopher sent numerous letters to the Board enclosing copies of various resolutions and newspaper clippings, etc., in support of the request for an early hearing, and many of his various letters were not served on the petitioners but apparently were sent to Congressional sources (Tr. 99, 132, 165, 387-398, 174, 358, 172, 401, 437, 484, 536-542). There was a subsequent telegram from him (Tr. 199) objecting to a postponement of hearing dates which seems also to have been sent to certain members of Congress (Tr. 200, 204, 270).

Sherman Adams of a letter from a member of the San Francisco Mayor's Committee enclosing certain materials and urging an early hearing (Tr. 560-564). There also was submitted near the time of oral argument a statement from Governor Brown in lieu of a "Rule 14" appearance (Tr. 268-271). Again, whatever may have been the technical propriety of these submissions in terms of procedural rules, they were typical of communications habitually received by the Board.

The Congressional letters were also illustrative of the type normally received. There were a number of such letters indicating a desire that the Board grant an early hearing on the nonstop application, or an interest or desire for information in the matter, or referring to or enclosing constituent letters relating thereto.*/ After the case had been set for hearing, there were Congressional letters inquiring as to the status of the case, expressing a hope or desire that decision would soon be forthcoming, urging that hearings be held in California, referring constituent letters (including those from travel agents and Mayor Christopher), asking that they be notified of the date of oral argument, etc.*/

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*/ Those received prior to or around the initial denial of American's motion on June 26, 1957 were from the following members of the California delegation:

Congressman Shelley (Tr. 167, 168, 424, 499); Congressman Maillard (Tr. 368); Senator Kuchel (370, 432, 469); Congressman Scudder (Tr. 372); Congressman Baldwin (Tr. 375); Senator Knowland (Tr. 381); Congressman Allen (Tr. 421); Congressman Moss (Tr. 427); Congressman Younger (Tr. 429); Congressman McFall (Tr. 456); Congressman Smith (Tr. 459); Congressman Teague (Tr. 461); Congressman Lipscomb (Tr. 508); Congressman Hillings (Tr. 515). Letters from members of the Congress in the New York area (mostly stated to be in support of The Port of New York Authority position that the Board grant a hearing) were received during the same period from Senator Ives (Tr. 435); Congressman Kean (Tr. 480); Senator Javits (Tr. 495); Senators Smith and Case (Tr. 497); Congressman Ray (Tr. 501, 514); Congressman Becker (Tr. 503); Congressman Canfield (Tr. 506); Congressman Gwinn (Tr. 510); Congressman Fino (Tr. 512); Congressman Latham (Tr. 520); Mrs. St. George (Tr. 522); Congressman Osmers (Tr. 524); Congressman Bosch (Tr. 529); Congressman Coudert (531).

After the initial denial but prior to the order setting the applications for hearing, communications were received from Congressman Shelley (Tr. 176, 557); Congressman Maillard (Tr. 545);

(footnote contiuned)

There were various letters or written statements sent to the Board around the time of oral argument, most of which were stated to be pursuant to the Board's Rule 14 and in lieu of a personal appearance.**/ Of the members of the Congress so communicating, some six had previously written to the Board.***/ The letters from Congressman Celler (Tr. 4490)

(footnote continued)

Senator Kuchel (Tr. 555); Congressman Baldwin (Tr. 570); Senator Knowland (Tr. 553); Congressman Allen (Tr. 574); Congressman Moss (Tr. 572); Congressman Younger (Tr. 549); Congressman Teague (Tr. 568); Congressman Gubser (Tr. 566); Congressman Sheppard (Tr. 576); Senator Pastore (Tr. 535).

*/ These communications were from Congressman Shelley (Tr. 192, 207); Senator Knowland (Tr. 205); Congressman Maillard (Tr. 212); Senator Kuchel (Tr. 215); Congressman Miller (Tr. 237, 248); Congressman Younger (Tr. 239); Senator Engle (Tr. 241); Congressman Cohelan (Tr. 243, 256); Congressman Johnson (Tr. 246); Senator Case (Tr. 251); Congressman Derounian (Tr. 258); Congressman Addonizio (Tr. 261); Congressman Rooney (Tr. 267).

**/ These were from Senator Engle (Tr. 280); Senator Kuchel (Tr. 284); Congressman Moss (Tr. 291); Mrs. St. George (Tr. 295); Congressman O'Brien (Tr. 297); Congressman Osmers (Tr. 299); Congressman Wainwright (Tr. 302); Congressman Anfuso (Tr. 305); Senators Javits and Keating (Tr. 308); Congressman Sisk (Tr. 320); Congressman Multer (Tr. 327); Congressman Celler (Tr. 4490); Congressman Bosch (Tr. 4488); Congressman Healey (Tr. 4491).

***/ Senators Kuchel, Javits, and Engle; Representatives St. George, Rooney and Bosch.

and Bosch (Tr. 4488) to which petitioners apparently object were submitted at the oral argument by Representative Keogh (Tr. 4512), and the Board's Chairman made specific reference to the written submissions by five other members of the Congress to which the petitioners also seem to take exception (Tr. 4506). In all, sixteen members of the Congress personally appeared at the argument (Tr. 4502) or had statements read into the record on their behalf. No exception is taken to these appearances, which were in literal compliance with Rule 14. Of these sixteen, nine had previously sent in letters of one sort or another,*/ and reference was made to two others who had previously written (Representatives Ray and Fino) as supporting more service (Tr. 4512).

---

*/ Representatives Shelley, Younger, Baldwin, McFall, Cohelan, Johnson, Miller, Maillard, Gibson.

APPENDIX B

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, *et seq.*, are:

* * * * * * *

DECLARATION OF POLICY: THE BOARD

Sec. 102. [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * * * * * *

GENERAL POWERS AND DUTIES OF THE BOARD

General Powers

Sec. 204. [72 Stat. 743, 49 U.S.C. 1324] (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under this Act.

* * * * * * *

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Sec. 401. [72 Stat. 754, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

Terms and Conditions of Certificate

(e) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

* * * * * * *

Authority to Modify, Suspend, or Revoke

(g) The Board upon petition or complaint or upon its own initiative after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

* * * * * * *

EVIDENCE

Power to Take Evidence

Sec. 1004 [72 Stat. 49 U.S.C. 1484] (a) Any member or examiner of the Board, when duly designated by the Board for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Board. In all cases heard by an examiner or a single member the Board shall hear or receive argument on request of either party.

* * * * * * *

Relevant provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, are:

* * * * * * *

Public Information

Sec. 3. [60 Stat. 238, 5 U.S.C. 1002] Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency--

(a) RULES.--Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

* * * * * * *

Decisions

Sec. 8. [60 Stat. 242; 5 U.S.C. 1007) In cases in which a hearing is required to be conducted in conformity with section 7--

* * * * * * *

(b) SUBMITTALS AND DECISIONS.--Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * * * *

The Principles of Practice of the Civil Aeronautics Board (14 C.F.R. 300, _et seq._), are:

300.0 APPLICABILITY OF PART.

The principles of practice set out herein to the extent applicable shall govern the relationships between the Board, its staff, and all other persons.

300.1 JUDICIAL STANDARDS OF PRACTICE.

In many respects the functions of the Board are similar to those of a court and parties to cases before it and those who represent such parties are expected to conduct themselves with honor and dignity. By the same token, the members of the Board, and those of its employees who participate with the Board Members in the determination of cases upon a record, are expected to conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff. The standing and effectiveness of the Board are in direct relation to its observance, that of its staff, and the parties and attorneys appearing before it, of the highest standards of judicial and professional ethics.

300.2 HEARING CASES - IMPROPER INFLUENCE.

It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases--

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

(b) It is likewise improper that there be any private communication on the merits of the case to a member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

300.3 CONCISENESS OF PRESENTATION.

Persons practicing before the Board should endeavor to present their cases in concise form avoiding cumulative and repetitious evidence, since the members of the Board participating in the decision of a case, after notice and hearing and upon a record, must familiarize themselves with the evidence in the record and with the arguments made on behalf of the parties orally and in written briefs, and must base their decision solely on the record.

300.4 UNUSUAL HOSPITALITY.

It is particularly improper that persons interested in the business of the Board should provide unusual hospitality to the Board or its staff; nor should such hospitality be accepted.

300.5 ATTORNEY-CLIENT RELATIONSHIP.

Persons practicing or appearing before the Board, whether or not members of the bar, should have due regard for the standards of professional conduct applicable to the lawyer-client relationship and to the relationship between a lawyer and a judicial tribunal.

(a) The nontechnical nature of the Board's procedure calls for special adherence, by practitioners to scrupulous standards of fairness, candor, and consideration for the rights of others in the pleadings filed, evidence submitted, conduct of the hearing, and briefs and arguments made. In appearing for a client, the practitioner thereby vouches on his honor that in his opinion the client's cause is one proper for determination, and in presenting pleadings and offering evidence he represents that the same are not offered for unwarranted delay and that in his opinion the content thereof is not misleading. Nor should he indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations.

(b) A practitioner, moreover, should advise his client to observe the law according to his conscientious belief as to its permissible meaning and should use his best efforts to restrain his client from improprieties in dealing with the Board or its staff. If a client persists in such improprieties, the practitioner should terminate their relationship.

300.6 VIOLATIONS.

The Board may disqualify and deny temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found after hearing by the Board to have engaged in unethical or improper professional conduct. Violation of any of the foregoing principles shall be deemed to be such conduct.

* * * * * * *

Relevant provisions of the Rules of Practice in Economic Proceedings of the Civil Aeronautics Board (14 C.F.R. 302, *et seq.*), are:

* * * * * * *

§ 302.14 Participation in hearings by persons not parties. Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned.

* * * * * * *

§ 302.18 Motions--(a) Generally. An application to the Board or an Examiner for an order or ruling not otherwise specifically provided for in this part shall be by motion. After the assignment of an Examiner to a proceeding, and prior to his recommended decision, or the expiration of the period within which exceptions to his initial decision may be filed, or the certification of the record to the Board, all motions shall be addressed to the Examiner. At all other times motions shall be addressed to the Board. All motions shall be made at an appropriate time depending upon the nature thereof and the relief requested therein.

(b) Form and contents. Unless made during a hearing, motions shall be made in writing in conformity with §§ 302.3 and 302.4 shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon. Motions made during hearings, answers thereto, and rulings thereon, may be made orally on the record unless the Examiner directs otherwise.

(c) Answers to motions. Within seven (7) days after a motion is filed, or such other period as the Board or Examiner may fix, any party to the proceeding may file an answer in support of or in opposition to the motion, accompanied by such affidavits or other evidence as it desires to rely upon.

* * * * * * *

§ 302.19(g) The provisions of this section are not applicable to the attendance of the Board members, officers or employees or the production of documentary evidence in the custody thereof at a hearing. Applications therefor shall be addressed to the Examiner in writing and shall set forth the need of the moving party for such evidence and its relevancy to the issues of the proceeding. Such applications shall be processed as motions in accordance with Rule 18, except that the grant thereof by an Examiner, in whole or in part, shall be immediately reviewed by the Board upon its own initiative and shall be subject to final Board action.

* * * * * * *

§ 302.24(j) Receipt of documents after hearing. No document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the Examiner.

* * * * * * *

WILBUR K. MILLER

3/22/60
MD Bar
1100

BRIEF FOR INTERVENOR
CITY AND COUNTY OF SAN FRANCISCO.

IN THE

United States Court of Appeals

For the District of Columbia Circuit

Nos. 15,414, 15,415

United Air Lines, Inc.
Trans World Airlines, Inc.
Petitioners,
vs.
Civil Aeronautics Board
Respondent,
American Airlines, Inc.
City and County of San Francisco
Intervenors.

On Petitions for Review of Orders of the Civil Aeronautics Board.

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United States Court of Appeals
For the
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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15,414, 15,415

UNITED AIR LINES, INC.
TRANS WORLD AIRLINES, INC.
Petitioners,
vs.
CIVIL AERONAUTICS BOARD
Respondent,
AMERICAN AIRLINES, INC.
CITY AND COUNTY OF SAN FRANCISCO
Intervenors.

On Petitions for Review of Orders of the Civil Aeronautics Board.

BRIEF FOR INTERVENOR CITY AND COUNTY OF SAN FRANCISCO.

Intervenor, the City and County of San Francisco, will rely on Respondent (hereinafter the Board) to set forth in full the reasons why the orders of the Board which the Court is here reviewing should not be vacated. This brief will be directed solely to petitioners' contentions concerning the adequacy of the Board's findings and conclusions and to their allegations that the proceedings below were vitiated by alleged ex parte representations.

SUMMARY OF ARGUMENT.

The Board concluded that there was a pressing public need for a third nonstop carrier in the New York-San Francisco market. In support of its conclusion, the Board made adequate findings which resolve all matters of law, fact or discretion presented in the record.

The petitioners, Trans World Airlines, Inc., and United Airlines, Inc., were given a full and fair hearing. The Board has correctly found that the allegations of improper ex parte activity were insubstantial, and that the alleged violations of its rules in no way prejudiced petitioners and were not disqualifying.

ARGUMENT.

A. THE BOARD'S ORDER CONTAINS ADEQUATE FINDINGS.

There was ample evidentiary support for the Board's conclusion that a third nonstop carrier was required in the New York-San Francisco market.

The Board found that New York-San Francisco is the third largest passenger-mile market in the country, but that the "air service available for this major transcontinental market . . . had not matched its economic importance. . . ." (Tr. 4733). This finding is supported by evidence in the record showing that New York-San Francisco was the largest market in the country without three nonstop carriers and that numerous markets which could not approach it in present traffic or future potential had three nonstop carriers (Tr. 4733).

The Board found that petitioners' services had not met the needs of the traveling public and "that the New York-San Francisco market has not in the past received the type of vigorous competition which its size and economic strength warrants" (Tr. 4745 & 4746). In fact the record shows that for years petitioners' nonstop capacity was but a fraction of the traffic volume (Tr. 4746). The obvious result of this, as the record shows, was that load factors on New York-San Francisco flights were excessively high and that many passengers had to use inferior services (Tr. 4734, 4735).

Furthermore, the Board found that petitioners began to respond to the needs of the market only when faced with the threat of competition posed by the motion filed in May, 1957, requesting a hearing on the need for a third carrier. This is supported by evidence showing that within a few short months after the motion was filed, petitioners increased their New York-San Francisco nonstop services by 75 percent (Tr. 4114) and three times during the period of a year prior to the hearing (Tr. 4093).

The Board further found that three nonstop carriers could operate profitably with jet equipment. The Board also made a careful assessment of the impact on petitioners of a third nonstop carrier. It found that market growth would compensate petitioners for the diversion caused by the third carrier and would allay any serious losses. And it further found that the public benefits which would result from the authorization of a third nonstop carrier outweighed petitioners' temporary loss of market growth.

The attack on the Board's findings borders on the frivolous.

United, but notably not Trans World, assails the Board's findings on service inadequacies. It does not suggest that New York-San Francisco nonstop services were adequate prior to May, 1957—when the motion for a hearing on New York-San Francisco nonstop service was filed—but it suggests that this all resulted from lack of equipment. These arguments were squarely rejected by the Board. Moreover, even if United's explanation were correct, nothing requires the Board to condone a carrier's failure to purchase equipment sufficient to meet the reasonable needs of the public.

The assertion that the Board should not have decided this case until there was experience with the operation of jet aircraft is a make-weight argument plainly designed to forestall competition. The estimates of future operations made by the Board in this case are no different in kind from those traditionally made by the Board in route cases. The Board noted that the data on which it based its estimates had been subjected to testing and, even though there has been a full year of experience in the operation of jet aircraft petitioners have come forth with no evidence which raises any serious question as to the accuracy of the Board's findings.

B. SAN FRANCISCO'S CONDUCT WAS CORRECT AND THERE WAS NO DEPRIVATION OF A FAIR HEARING.

Petitioners seek to create the impression that San Francisco engaged in reprehensible activities and deprived them of a fair hearing. Nothing could be further from the truth.

Petitioners' complaint is based on a conference between representatives of the City and County of San Francisco and the Board and the contents of the Board's public correspondence file in Docket No. 9214. These matters were entirely open and above-board. There is not in this case the slightest hint of secret activity.

And it cannot seriously be contended that petitioners were prejudiced by any of the above.

The conference with San Francisco took place in December, 1957. It was designed to permit San Francisco to acquaint the Board with the City's over-all transportation needs. There was no proceeding pending at the time of the conference and it is perfectly plain that a conference between the representatives of the City and the Civil Aeronautics Board held at a time when no proceeding was pending before the Board could not possibly have prejudiced petitioners' right to a fair hearing.

And what of the communications in the public correspondence file? The vast majority of these were sent to the Board before this proceeding began. They were letters from Congressmen, from the Mayor of San Francisco, and from members of the traveling public urging the Board to hold hearings. The remainder of the file is similarly innocuous, consisting of letters relating to procedural matters and statements submitted by Congressmen under Rule 14 of the Board's Rules of Practice.

Had petitioners thought it necessary to rebut any of the matters contained therein, they were free to do so. The documents were in the Board's Docket Section at all times, and were freely available to anyone interested in looking at them.

Moreover, the Board has expressly held that it did not consider the communications as matters of record for purposes of its decision, and that the communications did not influence its decision (Tr. 5457). The Board's order further reveals that such communications are answered by members of the staff and are rarely even brought to the attention of members of the Board.

In the light of this, it is small wonder that the Board found that petitioners were in no way prejudiced either by the conference with San Francisco or by the communications in the public correspondence file.

It is suggested, however, that the proceeding was vitiated because these communications violated Rule 2 of the Board's Principles of Practice which relates to private communications and pressure tactics.

But the Board found that the applicability of Rule 2 was indefinite. And even though the Board decided to apply the Rule in the broadest possible manner, it found no serious misconduct on the part of San Francisco. It found that many of the communications were not tied to San Francisco and were spontaneous. In fact, the worst the Board could say was that San Francisco "may" have overstepped the bounds of a rule which the Board itself found difficult to interpret (Tr. 5445). At the most, these were minor, technical violations. They did not prejudice petitioners. It was therefore entirely reasonable for the Board to have decided that San Francisco and New York should not be deprived of sorely needed services.

CONCLUSION.

In view of the foregoing, intervenor, the City and County of San Francisco, respectfully submits that respondent's orders herein reviewed should be affirmed.

Dated, San Francisco, California,
February 15, 1960.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief for Intervenor, the City and County of San Francisco, by mailing a copy thereof, postage prepaid, to each of the following addressees:

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Dated: February 10, 1960.

INTERVENOR'S MEMORANDUM IN REPLY TO STATEMENT BY DEPARTMENT OF JUSTICE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAR 10 1960

Joseph W. Stewart
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TRANS WORLD AIRLINES, INC., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO, *Intervenors*.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

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IN THE

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO, *Intervenors.*

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

INTERVENOR'S MEMORANDUM IN REPLY TO STATEMENT BY DEPARTMENT OF JUSTICE

The separate statement of the Department of Justice at pp. 52-53 of respondent's brief contends that the Board was under an "independent, affirmative duty" to hold a further evidentiary hearing respecting the alleged violations of the Board's rules by American Airlines.

The Department's contention, we submit, is unsound.

* * *

A most disturbing development in modern administrative law is its increasingly cumbersome, slow, expensive process. The evidentiary hearing itself is much slower and more expensive than the normal court trial, and it sets in train the further steps of briefs to the hearing officer, initial decision, exceptions, briefs to the agency, argument to the agency, decision by the agency, petitions for reconsideration, and answers thereto.

One fault of administrative agencies is a tendency to relegate problems to evidentiary hearings *before* considering whether hearings are necessary. It is human, perhaps in a busy agency to take this seemingly easy way instead of critical advance screening. But advance screening should be encouraged, so that agencies, like courts, will minimize wasteful process. (*Cf.* Rep. Att'y. Gen. Comm. Ad. Proc. 62 (1941)).

The courts, over the years, have developed techniques for avoiding needless trials and so for the improvement of the administration of court justice. Among those techniques are wise use of demurrer and other preliminary plea practice, very considerable development of the summary judgment procedure, and vigorous employment of the pre-trial conference.

* * *

In this case the Board employed a technique not unlike that of the courts. The allegations were made, evidence submitted by affidavit and voluminous documents, and full argument was held. At the argument, counsel for both petitioners assured the Board that a full evidentiary hearing on the allegations would merely provide cumulative proof (brief on behalf of American Airlines, p. 23, n. 21).

The Board carefully considered all the allegations and the evidence tendered, accepting for the purpose the truth of the well-pleaded allegations and of the evidence, and applied to the matter its knowledge of its practices and affairs. The Board recognized the well-established rule that only substantial and prejudicial violations of the rules warrant reopening of a case on the merits, and it was the unanimous conclusion that, as to San Francisco, such violations had not been indicated. As to American, the allegations were very limited, and the evidence pointed to nothing that was really significant in the view of the majority. That there was a dissent makes it certain that the question was fully considered by the Board.

* * *

It is to be noted that this is not a case, as in *Sangamon* and the other recent FCC cases, where something came to light after the agency had completed its action. Here the charges with the supporting evidence were submitted to the agency, which examined the matter with the benefit of full argument from the adversary parties. Here, moreover, unlike other cases, the agency's judgment is not tainted with personal involvement by agency members—such as allowing private, personal visits or receiving gifts and other personal attentions. Indeed, in the case of the Civil Aeronautics Board there is a consistent history of special alertness to the evils of the backdoor approach, beginning a decade ago with the adoption of its principles of practice (14 CFR § 300) and continuing through cases where, as the petitioners' own citations show (brief on behalf of United Air Lines, p. 27), it has been insistent upon protecting the integrity of its process. Indeed, in this very proceeding, the Board's alertness was plainly manifested. At the very outset of its December, 1957, conference with representatives of San Francisco, the Board made it very clear that it had no back door (Tr. 5467).

In these circumstances the Department's position is extreme beyond the dictates of the law. The Department does not contend that the Board's judgment was clouded by some mistaken principle; there is no quarrel with the Board's reliance upon the salutary rule that the wrong shown must be substantial and prejudicial.

Rather the Department appears to take the rigid view that the only method an agency can adopt for assessing charges of violations of its rules is the complete evidentiary hearing. Obviously an agency is free to insist on that method. Obviously, too, the Department of Justice might recommend to an agency that it insist on that method. But it is quite another thing to find that the law demands such a method to the exclusion of other rational techniques. When no sufficient case is made out on pleadings and supporting affidavits a court can dispose of a case without going to a full trial. Similarly the Board should be free to follow the course it adopted here. It would be ironical to discover, at this late date, that the law denies to the administrative agency discretion to follow the lead of the courts in its procedural method.

Respectfully submitted,

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BRIEF FOR INTERVENOR
CITY AND COUNTY OF SAN FRANCISCO

IN THE

United States Court of Appeals

For the District of Columbia Circuit

Nos. 15,414, 15,415

United Air Lines, Inc.
Trans World Airlines, Inc.
Petitioners,
vs.
Civil Aeronautics Board
Respondent,
American Airlines, Inc.
City and County of San Francisco
Intervenors.

On Report of the Civil Aeronautics Board
Following Remand

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United States Court of Appeals
for the District of Columbia Circuit
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Explanation of Reference Marks:

References to "Tr." are to the transcript of reopened hearings in this proceeding (pages 1 through 2265). References to "JA" are to the page number in the Joint Appendix used in the court appeal of this case. Some of the documents are not printed and will be referred to by their Exhibit number, e.g., BOE-1. References to "I.D." are to the Examiner's initial decision. References to "Op. R." are to the Board's opinion of remand. Emphasis has been supplied unless otherwise noted. All parties will be referred to by their common names after initial identification.

STATEMENT OF QUESTIONS PRESENTED

1. Whether San Francisco Violated the Civil Aeronautics Board's Rules and Principles of Practice in a Manner That Necessitates the Vitiation of the Award to American Airlines, Inc., to Render Nonstop Air Service Between San Francisco and New York.

2. Whether the Civil Aeronautics Board in Its "Opinion on Remand" Rightfully Concluded That the Purported Violations of Its Rules and Principles of Practice Were Found to Be Ambiguous, Technical in Nature, Indefinite in Meaning and Subject to Reasonable Misinterpretation.

3. Whether United and TWA Were Afforded Notice, Fair Hearing and Due Process Throughout the Proceeding.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15,414, 15,415

UNITED AIR LINES, INC.
TRANS WORLD AIRLINES, INC.
Petitioners,
vs.
CIVIL AERONAUTICS BOARD
Respondent,
AMERICAN AIRLINES, INC.
CITY AND COUNTY OF SAN FRANCISCO
Intervenors.

On Report of the Civil Aeronautics Board Following Remand

BRIEF FOR INTERVENOR CITY AND COUNTY OF SAN FRANCISCO

JURISDICTIONAL STATEMENT

This proceeding follows the Court's remand to the Civil Aeronautics Board:

> "1] . . . for the limited purpose of holding a hearing to determine, with all convenient speed, the relevant facts on the question of whether

> the Board's rules were so violated as to require a setting aside of the order on review;"

and

> " . . . that on the conclusion of the hearing the Board shall make its findings and report to this court. . . ."

See Court's order in *United Air Lines, Inc. v. Civil Aeronautics Board,* 281 F. 2d 53 (D.C. Cir. 1960).

This case originated through the petitions of United and TWA to set aside the Board's order authorizing American to render nonstop service between San Francisco and New York. The petitions alleged so-called *ex parte* activities in violation of the Board's Rules and Principles of Practice on the part of San Francisco and American to influence the Board's decision.

The Court in its opinion of 1960 sustained the Board's finding that the public convenience and necessity warranted a third nonstop service between San Francisco and New York, and supported the award to American. (*United Air Lines Inc. v. Civil Aeronautics Board,* supra.)

Thus, the remand was directed solely to the purported violations of the Board's Rules and Principles of Practice, with the Court specifically retaining jurisdiction over the proceeding.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are the Civil Aeronautics Act of 1938 (52 Stat. 973, et seq.), the Federal Aviation Act of 1958 (72 Stat. 754, 49 U.S.C.A. § 1371), the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. §§ 1001 et seq.), Principles of Practice of Civil Aeronautics Board (14 C.F.R. 300 et seq.), Rules of Practice in Economic Proceedings of the Civil Aeronautics Board (14 C.F.R. 302 et seq.) Pertinent provisions of the statutes and the rules and regulations are set forth in Appendix I, infra.

STATEMENT OF THE CASE

This proceeding had its inception in 1953, when American filed its application, Docket 5903, with the Board to eliminate a restriction which prevented nonstop service between San Francisco and New York. TWA and United for years had certificated authority to render such service. In the *Denver Service Case,* 22 C.A.B. 1178, decided November 14, 1955, the Board authorized American nonstop service between San Francisco and Chicago but refused nonstop authority to provide service to any points east of Chicago, i.e. New York/Newark.

San Francisco felt the Board's ruling in the *Denver* case was prejudicial to its economic interest and discriminatory to the six million people in the thirteen counties of Northern California who used the San Francisco Airport as a gateway. Further, it felt that with the inauguration of jet service, Los Angeles would gain a tremendous advantage over San Francisco with its existing three nonstop carriers to New York. (I.D. pp. 14, 15, 16.) Thus, this issue became of widespread concern throughout Northern California and to its federal, state, and local officials and was broadly commented upon in all the news media of the area.

Conscious of this attitude, American, after consultation within the company and with San Francisco officials, filed on May 3, 1957, a motion with the Board to sever out of its 1953 application in Docket 5903 the single issue of San Francisco-New York nonstop service and requested that an expedited hearing be held on this lone broad issue. (JA 1-20.)

On May 7, 1957, the Public Utilities Commission of the City and County of San Francisco held a public hearing to determine the action it would take on American's motion pertaining to New York-San Francisco nonstop service. *The record discloses that TWA, United, and American were represented by William Hanley, Warren Burke and Charles Strickler, respectively.* (Tr. pp. 398, 399, 400; I.D. p. 25.) On the above date, the PUC unanimously adopted a resolution (JA-240, 241) authorizing San Francisco to file an answer and motion with the Board in support of American's motion for an immediate hearing on the nonstop service to New York in Docket 5903. The resolution requested the Board of Supervisors of San Francisco to adopt a resolution urging the Board to activate the proceeding on the nonstop service. (JA-235, 236.) Also, copies of the PUC resolution were to be sent to the Mayor of the City and County of San Francisco, United States Senators from California, Congressmen from the San Francisco Metropolitan Area, and all other interested parties, requesting support for the answer and motion of San Francisco urging the Board to sever and set down for immediate hearing that portion of Docket 5903 proposing San Francisco-New York nonstop service.

San Francisco's answer and motion pursuant to the PUC resolution was filed with the Board on May 13, 1957 (JA-21) and service *was made on TWA and United.*

Also, the PUC on May 7, 1957, passed a resolution requesting the San Francisco Chamber of Commerce to endorse the PUC action with respect to American's motion and to seek support from all other Chambers of Commerce in Central and Northern California.

On May 14, 1957, the Transportation Committee of the San Francisco Chamber of Commerce held a public hearing *with representatives of American, TWA, United, and other carriers present,* for the purpose of determining what action it would take regarding the American application and the PUC resolution. It agreed to support the request for an expedited hearing. The Committee's recommendation was approved by the Board of Directors, who, through its President E. D. Maloney, addressed a letter to the Board on May 24, 1957, expressing support on the nonstop issue. (JA-208.) Copies of the letter to the Board were sent to all members of the

Transportation Committee, on which all the air carriers had representatives. (Tr. p. 1753.)

The San Francisco Downtown Association, a nonprofit organization of over 1,000 business, commercial and financial organizations, through its Board of Directors on May 8, 1957, adopted a resolution supporting a third nonstop service to New York. (JA-230.) Both Mr. Gray, Secretary, and Mr. Schlesinger, President of the Association were vague as to whether there was a hearing before the adoption of the resolution. They were both certain however that *representatives of the carriers were present, especially Mr. Warren Burke of United.* (I.D. pp. 35, 36; Tr. pp. 1671, 1701.)

Following the resolution adopted by the PUC on May 7, 1957, Mayor George Christopher sent the Board a series of communications seeking *an expedited hearing* on the need for a third nonstop carrier between San Francisco and New York.

The record discloses the following:

May 15, 1957, duplicate letters to Chairman Durfee and Member Hector with enclosed resolutions from various Chambers of Commerce, Boards of Supervisors and other civic groups (JA-101); May 21, 1957, copies of resolutions from various civic organizations (JA-229); May 23, 1957, newspaper clippings (JA-254); May 29, 1957, to Chairman Durfee, resolutions from various Chambers of Commerce, civic groups and copies of newspaper clippings from various newspapers. (JA-290 through JA-305.)

Joseph Martin, Jr. President of the PUC during the early part of this nonstop proceeding, apparently alerted George Milias and Marjorie H. E. Benedict of the resolution passed by the PUC on May 7, 1957. (JA-320; JA-321.)

On May 27, 1957 and May 28, 1957, United and TWA, respectively, filed answers in opposition to American's motion of May 3, 1957. (JA-26 through 41; JA-4 through 63.)

On May 29, 1957, Mayor Christopher sent another communication to the Board and the Board's Docket Section. (JA-75; JA-334.) *A copy of this letter was served on American, TWA, United, and New York Port Authority.* It contained as Appendix A, a list of thirty-four (34) citizens, municipalities and civic organizations who had forwarded communications to the Board urging an immediate hearing on the nonstop question.

It is true that Mayor Christopher and Mr. Martin contacted and solicited the support of those listed in Appendix A of the letter of May 29, 1957. (Tr. pp. 1853, 1854, 1855.)

On June 26, 1957, by Order E-11493 the Board by unanimous vote denied American's motion for severance and an expedited hearing, but ordered a staff study on the air service pattern between San Francisco and New York on or before December 1, 1957. (JA-90, 91.)

The Board's denial of American's motion for an expedited hearing prompted Mayor Christopher on

July 3, 1957, to express San Francisco's disappointment to the Board. He asked for participation in the staff study and that it be completed by September 3, 1957. Chairman Durfee replied on July 11, 1957, stating he considered the Mayor's letter a petition for reconsideration of Order E-11493, and that copies in conformity with the Rules of Practice be served *on other parties in the case.* On July 19, 1957, Mayor Christopher responded that the letter of July 3, 1957 was not intended as a petition for reconsideration of the Board's Order E-11493 but primarily to obtain an early completion of the staff's study. The letters of July 3 and 19, 1957 were served upon all Board members, American, TWA, United, Docket Section, New York and Oakland. (JA-95, 96; JA-108, 109; JA-378, 379, 380, 381, 382, 383, 384; see also, I.D. pp. 51, 52.)

On December 2, 1957, the Board held an oral conference with representatives of San Francisco on its over-all air transportation needs. (JA-973 through 986.)

On January 13, 1958, by Order E-12103 the Board, with two members dissenting, severed from American's application in Docket 5903 the New York-San Francisco nonstop service, ordered an expedited hearing and assigned the severed proposal as Docket 9214. (JA-97 through 100.)

After the activation of the nonstop case there was only one (1) single communication to the Board by a formal party. Mayor Christopher in a telegram of June 23, 1958, protested the postponement of the hearings from July 8, 1958 to July 30, 1958. (JA-114; I.D. p. 64.)

Admittedly, San Francisco requested Congressmen to appear at oral argument or to submit a statement under Rule 14 of the Rules of Practice. Also, San Francisco asked Northern California county boards of supervisors and others to submit statements to the Board or examiner under Rule 14.

These are the primary actions and communications of San Francisco adjudged by TWA and United as *ex parte* violations of the Board's Rules and Principles of Practice and upon which they base their allegations of lack of due process, unfair hearing, pressure and influence upon the Board.

The Court's attention is particularly directed to the record which discloses that TWA and United filed petitions for intervention in Docket 9214 under Rule 15(d) of the Board's Rules of Practice on January 27, 1958 and April 10, 1958, respectively. They were granted intervention by the Board's Order E-12463 on May 7, 1958.

STATEMENT OF POINTS

The Board correctly decided:

1. That the record clearly demonstrates that the Rules and Principles of Practice have not been substantially and prejudicially violated by either American or San Francisco and that the evidence falls short of establishing that the order granting the award to American should be set aside.

2. The record does not establish that either American or San Francisco violated the Rules of Practice in Economic Proceedings. (Part 302 of the Board's Procedural Regulations.)

3. That there is no evidence or allegation of venality; no personal misconduct of a member of the Board or the staff; no conscious bias; no wrongdoing on the part of third persons; no covert approaches or clandestine meetings between any party and any staff member, Examiner, or Board Member; and no tampering with the adjudicatory process of a type condemned by the courts.

4. That the findings of violations are dependent upon *technical construction* of the Principles of Practice; that this conclusion has not been reached without difficulty in view of the *ambiguity* of the language; that the findings for the most part are dependent on the construction and admittedly *unclear* proscriptions.

5. That the record provides no basis for holding that the contrary construction placed upon the Principles of Practice by American and San Francisco was not arrived at in good faith and was not a reasonable one.

6. That it has not been established that any of the parties were, in fact, prejudiced or denied a fair hearing.

SUMMARY OF ARGUMENT

The issues involved in this reopened proceeding are simple.

San Francisco wanted the Board to conduct a *hearing* upon its needs for a third nonstop air service to New York. Because of San Francisco's desire for a hearing, TWA and United through their various petitions have subjected San Francisco to charges of unfairness, unethical conduct, improper approaches to the Board, conspiracy with American, and violations of the Board's Rules and Principles of Practice. United has in its present brief dropped charges of violations of the Rules of Practice.

In the instant matter, TWA and United were afforded every conceivable opportunity to answer San Francisco's desire and request for a *hearing* on the nonstop issue.

Never once, through these protracted proceedings, have TWA and United denied that they had *notice* of San Francisco's activities in seeking support from our Senators, Northern California Congressmen, state and local officials, neighboring communities, and other important civic bodies and persons.

Never once have TWA and United denied participation in three local hearings on the San Francisco-New York nonstop case.

Never once have TWA and United alleged that San Francisco was guilty of venality, personal misconduct, covert approaches, or clandestine meetings with any staff member, Examiner, or Board member.

San Francisco categorically states that it always has and will always abide by the rules prescribed by judicial and quasi-judicial bodies and comport itself upon the highest level of ethical conduct.

The conclusion of the Board and Examiner that the technical violations by San Francisco were bottomed upon a reasonable construction of the Principles of Practice, and made in good faith, without unfairness, bias or prejudice toward TWA and United.

Although the doctrine of laches and the statutes of limitations do not apply in administrative proceedings, the fact remains that TWA and United hoarded their so-called grievances from May 7, 1957 until September 22, 1959, (Petitions for Reconsideration of the Board's Order E-14412) before first alleging that there were violations of the Board's Rules and Principles of Practice by San Francisco and American.

Clearly, the Court is warranted in sustaining the decision of the Board in awarding American nonstop authority between San Francisco and New York.

ARGUMENT

PRELIMINARY STATEMENT

TWA and United have had their day in Court to prove the charges made in their various petitions to this Court and the Board, that San Francisco and American violated the Board's Rules and Principles of Practice in such a manner to deprive them of a fair hearing and due process.

Regardless of good faith and fairness in the interpretation of the Board's Rules and Principles, admittedly ambiguous and uncertain in meaning, TWA and United assert that any deviation from either the Rules or Principles must vitiate this proceeding in order to protect the Board's adjudicatory process and the Court should order a trial de novo.

United, however, has withdrawn its earlier charges of violations of the Rules of Practice and now rests its petition upon the lone issue of violation of the Principles of Practice. Thus, it concedes that Congressmen can appear at oral argument or, in lieu of appearing, send statements to the Board; that boards of supervisors and chambers of commerce, state and local officials can file statements under Rule 14 either to the Examiner or Board. It has failed to discuss Rule 15(d) (intervention) thus admitting that it was not a party to the proceeding in Docket 9214 until May 7, 1958 (Order E-12463) and was never a party in Docket 5903. Further, United not becoming a party to the proceeding was not entitled to service of any document or letter filed with the Board under Rule 8(2) prior to May 7, 1958.

TWA still insists that San Francisco violated both the Rules and Principles of Practice and conspired with American to influence the Board in such a manner as to deprive TWA of a fair hearing and due process.

First, TWA contended San Francisco and American were joint venturers. *Second,* San Francisco and American were responsible under principles analogous to joint tort-feasors. The Board and the Examiner have repeatedly found that San Francisco and American acted independently. (Op.R. 22, 23; I.D. p. 185.) Now TWA advances a new theory—San Francisco and American were conspirators to commit illegal acts. (TWA Brief pp. 32, 33.) At no time and nowhere has any party to this proceeding heretofore suggested venality, misconduct of a member of the staff, wrongdoing on the party of third persons, covert approaches or clandestine meetings between any party and any staff member, Examiner or Board member, or corrupt tampering with the adjudicatory process of a type condemned by the courts. (Op.R. p. 28; I.D. pp. 110, 139, 140.)

San Francisco's actions throughout this proceeding were completely independent. (Section III, *infra.*) The fact that San Francisco exchanged ideas and held conferences with American cannot support TWA's proposition that we conspired to commit illegal acts. The authorities cited by TWA are not relevant to the instant matter. *American Tobacco Co. v. United States,* 328 U.S. 781 (1946) was a criminal conspiracy to violate the Sherman Anti-Trust Act. Four tobacco companies conspired to fix prices and exclude undesirable competition in the purchase of flue-cured tobacco and burley tobacco. In the New York Nonstop Case, San Francisco sought more and better competition among three carriers. *Truax v. Corrigan,* 257 U.S. 312 (1921) involved unlawful picketing by a campaign of libelous attacks and fear of injurious physical consequences and other illegal acts.

The court held: Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful.

In the case at bar, neither San Francisco nor American have concerted in any manner to perform unlawful acts. *Gebardi v. United States,* 287 U.S. 112 (1932) dealt with a criminal charge against a woman, who consented to transportation on a railroad for the purposes of illicit intercourse, being guilty of conspiracy to violate the Mann Act. The court held there was no conspiracy since she was not guilty under the Mann Act.

In *Northern Kentucky Teleph. & Telegraph Co. v. Southern Bell Teleph. & Telegraph Co.,* 73 Fed. 2d 333 (6th Cir. 1934) it was held that a conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement. The statute of limitations does not commence to run until the last overt act of the original agreement has been accomplished.

San Francisco certainly cannot be said to have entered into a partnership with American for criminal purposes.

Boyd v. United States, 142 U.S. 450 (1891) was a trial for murder where an instruction to the jury was used pertaining to a prior conspiracy to commit robbery. A new trial was ordered. The court did state that where there is a conspiracy to commit violence (robbery) which results in murder all the parties to the conspiracy are guilty.

TWA and United as copetitioners to the Court and to the Board never have commonly agreed where San Francisco was a violator of the Rules or Principles of Practice that jeopardized their fundamental right to a fair hearing and due process under constitutional guarantees.

I

TWA AND UNITED WERE ON NOTICE, AWARE OF SAN FRANCISCO'S ACTIVITIES TO OBTAIN A HEARING ON THE ISSUE OF A THIRD NEW YORK NONSTOP CARRIER, AND WERE AFFORDED A FAIR HEARING

> "The right to a hearing embraces not only the right to present evidence but also the reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.
>
> * * * *
>
> "Congress, in requiring a 'full hearing' had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature."
>
> *Morgan v. United States*, 304 U.S. 12, 18, 19 (1937). (TWA Brief pp. 29, 30.)

San Francisco subscribes to the doctrine of the *Morgan* case, and respectfully submits that TWA and United have been given a fair hearing and due process.

A. Local Hearings

TWA and United had three hearings on the local level. They participated in the hearings before the San Francisco PUC, San Francisco Chamber of Commerce, and the Downtown Association of San Francisco. (Statement of Case, *supra.*) In each of the above hearings, TWA and United were on notice of San Francisco's desire to obtain a *hearing* on the merits of third carrier nonstop service to New York. They attempted to dissuade San Francisco from filing a supporting answer to American's motion of May 3, 1957, in Docket 5903. They knew the contents of the resolutions providing for notification and seeking support of federal, state, and local officials, neighboring communities and organizations. (I.D. pp. 25, 30, 34, 35, 36.)

B. Mayor Christopher's Activities

With the exception of Mayor Christopher's telegram of June 23, 1958, a procedural matter and a commonplace communication to the Board (I.D. p. 129) protesting the postponement of the hearings, all communications to the Board were sent prior to the activation of the nonstop proceeding. (JA-114; I.D. p. 64.)

Among the communications was the letter of May 29, 1957 (JA-75; JA-334), *served* upon TWA and United, *containing* a *list of thirty-four (34) parties* who had forwarded communications to the Board.

The Mayor's letters of July 3, 1957 and July 19, 1957, were served upon all parties.

Thus, TWA and United were constantly aware and were on notice of San Francisco's communications to the Board. At no time did they formally protest. In fact, United answered one communication on July 29, 1957. (JA-95, 96.)

Mayor Christopher admittedly contacted San Francisco's representatives in Congress. As the Chief Executive of San Francisco, it is submitted, failure to notify our Congressional delegation and adjacent communities of the need for third carrier service to New York, would have subjected the Mayor to public criticism. There can be no doubt that the need for third carrier service to New York was a community concern. The spontaneous response to San Francisco's resolution of May 7, 1957, exemplifies the community interest in the New York nonstop issue.

It is a fact, however, TWA and United were constantly on notice of the effort being made by San Francisco to obtain an expedited hearing. United does not deny notice, nor does it deny a fair hearing. TWA cannot deny notice of San Francisco's answer and motion of May 7, 1957, the Mayor's letters of May 29, 1957, July 3, 1957 and July 19, 1957.

Mayor Christopher testified he discussed the expedited hearing with United and others. In fact he named Mr. Patterson, Mr. Bissinger, and Warren Burke. (Tr. p. 1943.)

C. Martin's Activities

Joseph Martin Jr., a prominent lawyer, was the President of the San Francisco Public Utilities Commission during the early stages of this proceeding.

Martin testified that the PUC resolution of May 7, 157, was given wide circulation throughout Northern California. (Tr. p. 1851.) He wrote George Milias and Marjorie H. E. Benedict. These two people wrote to various Congressmen without Martin's knowledge. (JA-320, 321; Tr. pp. 1851, 1852, 1853, 1854.) Martin also wrote to California Senators and San Francisco Congressmen. (Tr. p. 1855.)

These were the letters Martin was responsible for prior to January 13, 1958. Thereafter, no congressional support was sought by the PUC other than to have Congressmen appear at oral argument. (Tr. p. 1896.)

TWA and United having appeared before the PUC on May 7, 1957, knew the action that was to be taken, i.e., seeking congressional and neighboring community support for an expedited hearing.

D. San Francisco Conference With the Board

The Board, through Senator Kuchel's office granted San Francisco an oral conference on December 2, 1957. (Tr. pp. 1898, 1940; I.D. p. 58.) Mr. Martin and Mr. Albert Schlesinger represented San Francisco.

There was nothing unusual about this conference, nor was it violative of any Board Rule or Principle of Practice. However, the Board and Examiner hold that because Martin *intended* to discuss the need for a third nonstop carrier it was objectionable. Yet, the Board and Examiner find that the conference was restricted to a general discussion of San Francisco's transportation problems. (Op. R. 16; I.D. p. 59.)

TWA and United continue to urge that this conference was of such a nature as to vitiate the Board's award to American. If the San Francisco conference was wrong, the conferences held by the Board in the *Southern Transcontinental Service Case,* Docket 7894 and the recent *United-Capital Merger Proceeding,* Docket 11699 were also of such a nature as to vitiate those proceedings. Further, the record in the *United* Conference was wholly upon the merits, without any cautionary statement from the Board.

The Examiner points out:

> "For years other cities and Chambers of Commerce have simply written or talked to the Board with respect to their air service problems." (I.D. p. 121.)

It is difficult for San Francisco to understand TWA and United's complaint regarding the San Francisco conference. Nor, can San Francisco understand the Board's finding that there was a violation of any Principles of Practice because of the conference. (See: Op. R. p. 35, sec. 3.)

> "It has been the established policy of the Board to have such informal presentations by municipalities as to their general needs for improved air service. For example, similar conferences have been held by the Board in the past

> with representatives of Orlando, Houston and Reno. Indeed, United, one of the complaining carriers regarding off-the-record matters in the New York-San Francisco nonstop proceeding, recently took part in such a conference with the Board relating to the proposed merger of United and Capital Airlines. During this conference, United's President was allowed to comment on the merits of the merger proposal to a limited extent." (I.D. p. 58 fn. 43.)

The Board in Order E-14664, dated November 19, 1959, at page 14, points out that TWA and United had ample time to object to the San Francisco conference:

> "While the references to the New York-San Francisco service are understandably objectionable to Trans World and United, we think that any resulting prejudice was cured by the immediate publication of the transcript and the six-week interval between the Conference and our order (granting a hearing), during which the parties were free to rebut San Francisco's remarks by the filing of appropriate papers."

After the City of Oakland conference with the Board on July 14, 1960, United and other parties did not hesitate to rebut that City's *ex parte* presentation to the Board.

Both TWA and United object to San Fancisco sending its State Legislative Representative (Donald Cleary) to Washington prior to the conference of December 2, 1957. Aside from seeing Congressman Sheperd, who subsequently wrote to the Board, it is difficult to determine what Cleary did in Washington. He didn't make a *single* contact with any member of the Board or staff. He didn't see any American representative prior to the conference. (Tr. pp. 653, 658, 664, 665, 830-832.)

The fact that newspapers published accounts that Cleary was to "lobby" the Board, does not make it so. Cleary was under subpoena but was never called by the Bureau of Enforcement at the San Francisco hearings in this reopened inquiry. (Tr. p. 1913.) If any Cleary activity in Washington was improper or violative of any Board Rule or Principle, the Bureau, TWA and United had every opportunity to produce the data.

II

SAN FRANCISCO'S CONSTRUCTION AND INTERPRETATION OF THE RULES AND PRINCIPLES OF PRACTICE WERE REASONABLE, IN GOOD FAITH, WERE NOT PREJUDICIAL, AND DID NOT DEPRIVE TWA AND UNITED OF A FAIR HEARING AND DUE PROCESS

San Francisco's interpretation of the Rules and Principles of Practice may not coincide with that of the Board, Examiner, staff or other parties; yet, the adherence to San Francisco's understanding of the Rules and Principles of Practice cannot lend credence to TWA's and United's allegations of a deliberate attempt to pressure or influence the Board and deprive them of a fair hearing and due process.

A. San Francisco Did Not Violate the Rules of Practice

TWA and United claim a lack of due process and a fair hearing for San Francisco's failure to serve them with many of the communications to the Board prior to May 7, 1958. San Francisco was under no obligation either by Rule or Principle to serve either carrier before they became parties to the proceedings. TWA and United filed petitions to intervene under Rule 15(d) on January 27, 1958 and April 10, 1958, respectively. These petitions were not granted until May 7, 1958, by Board Order E-12463. (JA-451.)

The Examiner rightly found:

> "Furthermore, contrary to the arguments of TWA and United, there was no requirement of service upon them of the communications to the Board requesting a hearing. Rule 8, which provides for service of documents filed with the Board, states that a document 'shall be served . . . upon all parties to the proceeding in which it is filed. . . .' However, Rule 15(d) provides that a person becomes a party only when he has been granted intervention in a proceeding. In the nonstop case, prior to January 1958, TWA and United had never sought, much less been granted, intervention in Docket 5903, the docket of American's application containing its request for New York-San Francisco nonstop authority. Accordingly, they were not parties to any 'proceeding' and nothing filed with the Board in 1957 relating to Docket 5903 was required to be served upon TWA and United." (I.D. p. 127.)

The Examiner points out that TWA and United did not serve Eastern Airlines with their answers to American's motion of May 3, 1957, although Eastern was an applicant for nonstop authority between New York and San Francisco. Neither did they serve the New York Chamber of Commerce. (I.D. p. 128.)

It was not incumbent upon Mayor Christopher, Mr. Martin, the various communities and persons supporting San Francisco's plea for an expedited hearing, to serve TWA and United with any documents prior to May 7, 1958. Furthermore, Section 401(c) and (g) of the Federal Aviation Act of 1958 (formerly Civil Aeronautics Act of 1938), provides in part:

> "Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate."

The right to file a protest or memorandum is part of the organic law. The Examiner, in his able opinion, observes:

> "Sections 401(c) and 401(g) of the Federal Aviation Act specifically grant any interested person *an unqualified right* to file with the Board a 'protest' or 'memorandum' in opposition to or in support of any application for the issuance of a certificate or an amendment of a certificate of public convenience and necessity. Insofar as this right relates to filing of pre-case communications . . . i.e. communications prior to the activation of an economic proceeding . . . *the Board has never purported to prescribe or limit in any way that right in its procedural rules and principles of practice."* (I.D. p. 114.)

The right to file protests or memorandum under Section 401 is not violative of Section 3 of the Administrative Procedure Act.

> "The important consideration is that although the right to file a protest or memorandum was in effect at all stages of the nonstop proceeding,

> such protest or memorandum could not become part of the formal record unless filed in accordance with the requirements of Rule 14." (Op. R. p. 7 fn. 13.)

The Principles of Practice, especially Rule 2 sets forth the following:

> "It is essential in cases to be determined *after notice* and *hearing* and *upon a record* that the Board's judicial character be recognized and protected. In such cases:
>
> "(a) It is improper that there be any *private communications on the merits of the case* to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided by law."

There was "no case" prior to January 13, 1958, consequently "no notice" was required; "no hearing" was contemplated; there was "no record"; and there was nothing to communicate "on the merits of the case".

San Francisco was not required under any Board rule to serve TWA and United with its answer and motion of May 7, 1957.

Rule 18, the motion provision of the Board's Rules does not provide for the service of motions or answers. The Examiner in referring to the American and San Francisco request for an expedited hearing, states:

> "Rule 18 does state that a request for an order or ruling by the Board not otherwise specifically provided for in the Rules of Practice shall be made by motion. But to label such a request a

> 'motion' does not add any service requirement if, as here, no one has yet intervened as a party in the docket to which the request or motion relates. American and San Francisco served their May 1957 motions on TWA and United, but they were not required to do so by any Board rule." (I.D. p. 127 fn. 89.)

B. The Congressional Arguments and Communications to the Board Under Rule 14 Conformed to the Board's Rules and Principles of Practice

United concedes that Congressmen may argue or send statements in lieu of arguments at the time of Oral Argument to the Board. (United's Brief, p. 8 fn.)

TWA contests the right of solicitation of Congressmen to support an application or City's position at Oral Argument. (TWA Brief, p. 14.)

San Francisco was responsible for nine (9) Congressmen personally appearing at Oral Argument and three (3) others sent statements. Senators Kuchel and Engle also submitted statements. (I.D. pp. 76, 77, 101; Tr. pp. 615, 616, 617.)

Although the Examiner has some doubt as to soliciting Congressional support for Oral Argument, he nevertheless concedes that "the Board has consistently allowed Congressmen to appear at oral argument under that Rule (14) either in person or by a representative or by written statement or letter." (I.D. pp. 114, 133.)

The Board however expresses no doubt as to Congressmen submitting written or oral statements under Rule 14.

> "Statements by Congressmen, whether written or oral, were interpreted by the Board to be authorized by Rule 14 and were formal statements on the record. In soliciting such statements there would be, therefore, no question of soliciting *ex parte* extra-record communications, and the propriety of such solicitation has, as noted by the Examiner, been upheld in *Eastern Airlines v. Civil Aeronautics Board,* 271 Fed. 2d 752 (CA 2d 1959)."

San Francisco was responsible for thirteen (13) Bay Area County Boards of Supervisors filing statements with the Examiner or the Board under Rule 14 after the conclusions of the public hearings. (I.D. p. 85.)

Mr. Charles Miller of the San Francisco Chamber of Commerce solicited various Chambers of Commerce of Northern California to file supporting statements under Rule 14 after the close of the hearing. (I.D. p. 32.)

Both the Examiner (I.D. p. 85) and the Board (Op. R. p. 8 fn. 14) agree that obtaining support of County Boards of Supervisors and Chambers of Commerce was not violative of the Board's Rule 14.

Thus, TWA cannot complain that San Francisco violated Rule 14 so as to deprive it of a fair hearing and due process.

C. The Principles of Practice Were Ambiguous, Uncertain and Subject to Honest Misinterpretation

The Board and the Examiner both found that San Francisco did not violate the Rules of Practice. However, they found San Francisco and American violated the Principles of Practice, but that such violations did not deny TWA and United a fair hearing and were not of such a nature as to vitiate the nonstop award to American. (Op. R. pp. 35, 36; Tr. pp. 185, 186.) San Francisco cannot subscribe to the latter finding; for, as shown and admitted, there were no violations of the Rules. Hence, it follows that the Principles could not have been consciously violated.

First: The complaint of TWA and United is that San Francisco violated Rule 2(a) and 2(c) of the Principles of Practice in such a manner as to deprive them of a fair hearing and due process.

Second: The Board and Examiner contend that even *an attempt* without accomplishment is a technical violation of the Board's standards of practice, regardless of the ambiguity, uncertainty, and common misunderstanding of the Principles.

The preface of Rule 2 (Hearing Cases—Improper Influence) outlines the standard of ethical conduct for parties to cases before the Board.

The preface provides:

> "It is essential in cases to be determined *after notice* and *hearing* and *upon a record* that the Board's judicial character be recognized and protected."

The preamble of Rule 2 prescribes the conduct that must be adhered to by parties in *recognition* and *protection* of the Board's *judicial character.* The Rule states: "*after notice* and hearing and *upon a record* (then) the Board's *judicial* character is to be recognized and protected."

San Francisco asks the Court to recognize the Board's capacities and to distinguish the prescriptions given to the Board under the Federal Aviation Act. The Board occupies a tripartite position: (a) Ministerial, (b) Administrative, and (c) Judicial.

Any infringement upon the Board's *judicial* character in contrast to the Board's *administrative* character can only be determined upon the Board's divesture of its administrative role. The Board maintained, in the instant case, its three capacities until January 13, 1958, when it ordered an expedited hearing on the San Francisco-New York Nonstop issue. (Order E-12103.) Then, by its order, the Board put all *parties* on notice that a *hearing* was to be held upon a record. Communications, conferences or other *ex parte* activities prior to the Board's Order E-12103 had nothing to do with the *recognition* and *protection* of the Board's *judicial character* under Rule 2 of the Principles.

There could be no infringement upon the Board's judicial character until it decided a hearing was necessary to determine the need for three carrier nonstop service between San Francisco and New York.

From June 26, 1957, when the Board denied American's motion, Order E-11493, until January 13, 1958, by Order E-12103 when the Board upon its own initiative activated the San Francisco-New York Nonstop proceeding, a *vacuum* existed between the Board's administrative and judicial character. Up to the time the Board issued its order (notice) that a hearing was to be held it functioned in its *administrative* capacity.

San Francisco's activities and communications to the Board prior to the *notice of hearing* on January 13, 1958, were not directed to the Board's *judicial* character as distinguished from its *administrative* character. San Francisco only sought a hearing on its needs for a third competitive nonstop carrier to New York. Such a request for a hearing is directed to the Board's administrative, rather than its judicial character. TWA concedes that, "if the Board should have on its own motion set down a hearing on the question of a third New York-San Francisco carrier, San Francisco would have urged it be granted." (TWA Brief, p. 24.) Parenthetically, San Francisco urged the need for a third carrier service to New York from the institution of the *Denver* case in 1953. The Board did *administratively* order an investigation of the need for a third carrier service between San Francisco and New York, Order E-11493 and did on its own *administrative* motion, Order E-12103, order a hearing on the merits of the need for third carrier service.

> "In relation to the functions of Securities & Exchange Commission (CAB), it is said a 'hearing' presupposes a formal proceeding *on notice*, with adversary parties, with issues on which evidence may be adduced by both parties and in which all have a right to be heard. On the other hand, 'an investigation' is conducted in order to determine whether the facts justify a determination

> by the Commission to hold a 'hearing' or to bring suit for injunctive relief. The investigation makes no determination or decision between the parties, for there are no parties."

See anno: 85 L.ed. 559, 561, citing *Re Securities and Exchange Commission,* 84 Fed. 2d 36 (2d Cir. 1936). See also: *Bowles v. Baer,* 142 Fed. 2d 787 (7th Cir. 1944).

After the Board set a *judicial* hearing there is no evidence, except Mayor Christopher's procedural inquiry of June 23, 1958, that San Francisco in any manner violated any ethical standard of conduct prescribed by Rule 2.

San Francisco submits the Board's judicial integrity was at all times respected when the hearing was ordered on the merits of the need for third carrier service to New York.

The status of the parties to the proceeding at the time the Board ordered a hearing is also important in the interpretation of Rule 2 of the Principles of Practice.

The *notice* of hearing was January 13, 1958. (Board's Order E-12103.) As heretofore shown TWA and United were given ample *notice* of San Francisco's activities. TWA and United were not parties and as found earlier herein, they were not entitled to *any notice* until they became intervenors on May 7, 1958.

The *hearing* and *record* were concluded on April 29, 1959. (Oral argument.) The Board and the Examiner, with the exception of Mayor Christopher's telegram (procedural request), of June 23, 1958, have found no direct *ex parte* communication to the Board from a party to the case after January 13, 1958. (Op. R. p. 24; I.D. p. 128.)

The only party to this proceeding on January 13, 1958, *was American.* San Francisco could be considered a party because it filed a motion on May 7, 1957, and was entitled to a comparative hearing under the *Ashbacker* case, 326 U.S. 327 (1945). Clearly, Northwest, TWA, United, Oakland, and New York could not be considered parties until intervention was granted on May 7, 1958.

Rule 2(a) provides:

> "It is improper that there be any private communication *on the merits of the case* to a member of the Board or its staff or to the examiner in the case by any person either in private or public life, *unless provided by law.*"

There was *"no case"* and *"no communications on the merits"* of the case sent prior to January 13, 1958, violating any Board principle. *But the law,* Federal Aviation Act, Section 401, *supra,* provides that any person can send a "protest" or "memorandum" in support or against an application for a certificate. There is no time limitation in section 401. It does not provide that communications can only be sent to the Board when and after a *hearing* is requested, a *case* started, or at time of *oral argument. The organic law is paramount.* When the Civil Aeronautics Act of 1938 was changed by Congress in 1958, the provisions of section 401 were not changed. It is evident that Congress intended that anyone, at anytime, could communicate with the Board. Nor has the Board attempted to modify the provisions of section 401 under its rule-making power.

Furthermore, all communcations from San Francisco, its representatives and supporters were placed on the record or in the Board's correspondence file.

San Francisco never attempted any private conference or did we have private correspondence with any staff member. The ambiguity and uncertainty of the meaning of the Principles of Practice is clearly demonstrated by TWA and United's interpretation that a conference with the Bureau was permissible and proper.

The record discloses that on June 3, 1960, prior to this reopened proceeding, TWA, United, and the Bureau of Enforcement felt at liberty to *privately* correspond with one another. On June 3, 1960, TWA and Bureau held a private conference. (BOE-116; Tr. p. 2254.) From that conference, the Bureau, in turn, wrote both TWA and United as follows:

> "We would appreciate it if you would furnish this Bureau in the immediate future, in summary form and by category (e.g. travel agents, civic organizations etc.): (1) the names of witnesses whom United Air Lines, Inc. [TWA] considers necessary to be called to testify in support of the allegations made in its petition for reconsideration to the Board and on appeal to the Court of Appeals, (2) a synopsis of the matters about which such witnesses may be expected to testify,

> and (3) a list of documents necessary to be offered or produced in support of the aforesaid allegations. (Please indicate whether such documents are in official Board records or where same may be found.)" (BOE-117; Tr. p. 2254.)

This remanded proceeding was ordered by this Court on May 19, 1960. The Board, pursuant to the remand, issued Order E-15342 reopening the proceeding under Docket 9214 et al.

Neither the Bureau, TWA, or United served San Francisco with a copy of the above communication under Rule 8. Nor has anyone of them tried to justify the conference and communication under Rule 2 of the Principles.

San Francisco submits TWA and United must have considered the Rules and Principles ambiguous and uncertain. Certainly, San Francisco does not, because of the above related conduct, accuse them of misconduct or attempting to deprive San Francisco of a fair hearing and due process on the Court's remanded hearing.

The Examiner found the Principles ambiguous and contradictory, and that there were differences of opinion as to the meaning of "ex parte communication". He also found that it would be only through the medium of a "technical" interpretation of such ambiguous Principles that a conclusion of violation could be made. (I.D. pp. 134, 135, 139.)

The Board states:

> "Thus it is clearly evident that our findings of violations are dependent in major part on a *tech-*

> *nical construction* of the Principles of Practice so as to make then applicable to activities prior to the time the proceeding was set down for hearing." (Op. R. p. 26.)

Further,

> ". . . [O]ur findings here for the most part are dependent on the construction and application of admittedly unclear proscriptions." (Op. R. p. 27.)

In speaking of the ambiguity of the language of the Principles, the Board asserts:

> "This record provides no basis for holding that the contrary construction placed upon them by American and San Francisco was not arrived at in good faith and was not a reasonable one." (Op. R. 27.)

The record discloses that San Francisco issued one press release on May 9, 1957. (JA-322.) The contents of this release recites the action of the PUC and data taken from San Francisco's answer and motion of May 7, 1957. Aside from this release, San Francisco sent to the Board, through Mayor Christopher, newspaper clippings in the letters of May 23, 1957 (JA-254, et seq.) and May 29, 1957. (JA-290, et seq.)

Mayor Christopher had a news-clipping service (Tr. p. 124), and so did the Board. (Tr. p. 1326.) Obviously the Mayor in transmitting news clippings was duplicating a service rendered to the Board.

Mayor Christopher's news clippings of May, 1957, certainly had a negative effect in "pressuring" or "influencing" the Board. On June 23, 1957, by Order

E-11493, the Board denied American's motion to sever and expedite the New York nonstop portion of Docket 5903.

The Mayor's clippings were for the sole purpose of acquainting the Board with the interest Northern California had in obtaining *a hearing* on the nonstop issue.

These communications can hardly be said to have violated Rule 2(c) of the Principles. There was *no case* and they were not *communication on the merits.*

The Examiner found:

> ". . . the extra-record communications (prior to January 13, 1958) in question were almost wholly directed *to the question of whether there should be a hearing and were not prejudicial.*" (I.D. p. 177.)

San Francisco submits that a fair and reasonable interpretation of the Principles of Practice will conclude that no violations were committed in our seeking an expedited hearing on the merits of the need for additional nonstop service to New York.

III

SAN FRANCISCO ACTED INDEPENDENTLY OF AMERICAN THROUGHOUT THE NEW YORK-SAN FRANCISCO NONSTOP PROCEEDING

TWA and United have attempted to link San Francisco and American in some type of joint venture or conspiracy to influence and pressure the Board. The record clearly shows that although San Francisco and

American discussed the nonstop issues and advised each other of their actions, each acted independently of the other.

The Examiner, as the trier of facts in this reopened proceeding, has found:

> "The City flatly rejected American's request that it file a motion to activate a new nonstop proceeding in the early months of 1957 (I.D. p. 96); The City circulated a draft resolution of its own to outlying municipalities in the Bay area (I.D. p. 97); The City was handling its own case under the overall policy direction of the PUC and Mayor Christopher and under the trial direction of Dion Holm (then), City Attorney and Frank J. Needles, Deputy City Attorney (I.D. p. 99); San Francisco made its own decisions and contacts for such support (Congressional and official) (I.D. p. 99); Needles and Miller interviewed others (witnesses) in the Bay area . . . and, Miller made the choice of persons to testify on behalf of the Chamber of Commerce of San Francisco (I.D. p. 93); Martin made it clear that we (San Francisco) didn't care which airline got the third nonstop route (I.D. p. 96); San Francisco already had communicated with the Congressmen requesting them to appear at oral argument (I.D. p. 101); . . . the contents of communications and pleadings of San Francisco rested primarily with the City Attorney's office and other City officials (I.D. p. 98)."

The fact that San Francisco and American held conferences, exchanged data and assistance does not in any manner reflect upon the independent judgment exercised by each of the parties.

In *T.A.N. v. Pan American Airways,* Order E-15880, October 5, 1960, where it was charged that cooperation was improper, James Anton, Director of the Bureau of Enforcement, dismissed the charge with Board approval, stating:

> "It is expected that parties who are permitted to intervene in a proceeding of this nature would coordinate their presentations in order to eliminate duplication and repetition and thereby hasten the Board's processes."

San Francisco submits its relationship with American during the course of the nonstop proceeding violated no Rule or Principle of Practice.

IV

THE FAILURE OF TWA AND UNITED TO RAISE EX PARTE ISSUES TWO YEARS AFTER THE COMMENCEMENT OF THE NONSTOP PROCEEDING SHOULD NOT BE EXCUSED

TWA and United hoarded their so-called grievances from May 7, 1957 until September 22, 1959 (Petitions for Reconsideration, Board's Order E-14412) before first alleging that there were violations of the Board's Rules and Principles of Practice by San Francisco and American. That TWA and United had knowledge of San Francisco's activities from the beginning and throughout the nonstop proceedings cannot be denied in the face of the record and factual data heretofore submitted.

Rule 37(b) (Petition for Reconsideration—Contents of Petition), provides in part:

> "If the petition is based, in whole or in part, on new matter, such new matter shall be set forth, accompanied by a statement to the effect that petitioner, with due diligence could not have known or discovered such new matter prior to the date the case was submitted for decision."

Such was not the case with TWA and United. Their complaints of so-called *ex parte* communications were stale. The Board recognized this fact in denying TWA and United's petitions for reconsideration of Order E-14412. It stated:

> "Although our decision is based upon a consideration of the dual public interest in the integrity of the administrative process and in the increased air service here authorized, *the reasonableness of our conclusion is weighted by the tardy manner in which the charges were made.* The great bulk of the communications reflecting the pattern of conduct to which objection is made were included in the Board's public correspondence file *prior to the institution of an evidentiary hearing* and, had these allegations been heard at that date, any supposed prejudice could have been cured by appropriate Board admonition before the fresh start afforded by the beginning of the evidentiary hearing."

And further:

> ". . . we can only conclude that petitioners (TWA and United) hoarded their grievances until after the decision on the merits. We think that the unreasonable delay is a factor to be considered in deciding, on reconsideration, whether to deprive the general public of the needed service." (JA-

963, 964; see: Rule 37(b) Board's Rules of Practice.)

The Courts themselves frown upon tardy claims, especially when complainants had ample opportunity to present their grievances at early stages of the proceedings.

See:

Pacific Livestock v. Lewis, 241 U.S. 440 [1915];
Market Street Railway Co. v. Railroad Commission, 324 U.S. 548 [1944].

CONCLUSION

For the reasons hereinabove set forth, San Francisco respectfully prays that the Orders of the Civil Aeronautics Board under review and that the Award of the Certificate of Public Convenience and Necessity issued to American Airlines be affirmed and that the charges made by TWA and United herein be dismissed.

May 19, 1962.

Respectfully submitted,
Thomas M. O'Connor,
City Attorney,
William F. Bourne,
Public Utilities Counsel,
Attorneys for Intervenor
City and County of San Francisco.

(Appendix I Follows)

APPENDIX I

A. Pertinent provisions of the Federal Aviation Act are as follows:

Section 401 (a-c, g) (72 Stat. 754, 49 U.S.C. §1371):

(a) No air carrier shall engage in air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as posible.

Authority to Modify, Suspend or Revoke

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: PROVIDED, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

B. Relevant provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, are:

* * * *

Public Information

Sec. 3. (60 Stat. 238, 5 U.S.C. 1002.) Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

* * * *

C. The Principles of Practice of the Civil Aeronautics Board (14 C.F.R. 300, *et seq.*), are:

300.0 APPLICABILITY OF PART.

The principles of practice set out herein to the extent applicable shall govern the relationships between the Board, its staff, and all other persons.

* * * *

300.2 HEARING CASES—IMPROPER INFLUENCE.

It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases—

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

* * * *

(c) It is improper that there be any effort by any person interested in the case to sway the judgment or the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

D. Relevant provisions of the Rules of Practice in Economic Proceedings of the Civil Aeronautics Board (14 C.F.R. 302, *et seq.*), are:

* * * *

§302.8(2) *The parties.* Answers, petitions, motions, briefs, exceptions, notices, or any other documents filed by any party or other person with the Board or an Examiner shall be served by the person filing such document upon all parties to the proceeding in which it is filed, and proof of service shall accompany the document when it is tendered for filing.

§302.14 *Participation in hearings by persons not parties.* Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned.

* * * *

§302.15(d) *Effect of granting intervention.* A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order.

* * * *

§302.18 *Motions*—(a) *Generally.* An application to the Board or an Examiner for an order or ruling not otherwise specifically provided for in this part shall be by motion. After the assignment of an Examiner to a proceeding, and prior to his recommended decision, or the expiration of the period within which exceptions to his initial decision may be filed, or the certification of the record to the Board, all motions shall be addressed to the Examiner. At all other times motions shall be addressed to the Board. All motions shall be made at an appropriate time depending upon the nature thereof and the relief requested therein.

(b) *Form and contents.* Unless made during a hearing, motions shall be made in writing in conformity with §§ 302.3 and 302.4, shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon. Motions made during hearings, answers thereto, and rulings thereon, may be made orally on the record unless the Examiner directs otherwise.

(c) *Answers to motions.* Within seven (7) days after a motion is filed, or such other period as the Board or Examiner may fix, any party to the proceeding may file an answer in support of or in opposition to the motion, accompanied by such affidavits or other evidence as it desires to rely upon.

* * * *

§302.37(b) *Contents of petition.* A petition for reconsideration, rehearing, or reargument shall state, briefly and specifically, the matters of record alleged to have been erroneously decided, the ground relied upon, and the relief sought. If the petition is based, in whole or in part, on allegations as to the consequences which would result from the Board's order, the basis of such allegations shall be set forth. If the petition is based, in whole or in part, on new matter, such new matter shall be set forth, accompanied by a statement to the effect that petitioner, with due diligence, could not have known or discovered such new matter prior to the date the case was submitted for decision.

BRIEF FOR INTERVENOR AMERICAN AIRLINES, INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15,414, 15,415

UNITED AIR LINES, INC.,
TRANS WORLD AIRLINES, INC.,
Petitioners,
v.
CIVIL AERONAUTICS BOARD,
Respondent,
AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 19 1962

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the decision of the Civil Aeronautics Board to authorize American Airlines, Inc., to omit intermediate stops on its San Francisco-New York air service should be set aside because American sought expressions of support from interested persons and groups for a proposal that the CAB institute a case to consider the grant of such authority and did not advise such persons and groups that they could express their support only in accordance with the formal procedures of the CAB, or because American sought newspaper publicity concerning the proposal that such a case be instituted in order, among other things, to encourage such support?

2. Whether such decision should be set aside because American issued conventional press "handouts" during the pendency of such case on occasions such as the filing of exhibits or the convening of a session of the hearing?

3. Whether such decision should be set aside because in a few instances American's salesmen asked customers, if interested in the nonstop matter, to express that interest to their Congressmen in order to encourage such Congressmen to exercise their privilege to appear at the oral argument in the case?

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Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR INTERVENOR AMERICAN AIRLINES, INC.

By its opinion and order dated May 19, 1960, this Court remanded to the respondent Civil Aeronautics Board the *San Francisco-New York Nonstop Service Case* with instructions to hold a "hearing to determine, with all convenient speed, the relevant facts on the question of whether the Board's rules were so violated as to require a setting aside of the [Board's] order" authorizing the intervenor American Airlines, Inc., to operate nonstop air service between San Francisco and New York. The Court retained jurisdiction pending receipt of the CAB's findings and final report.

The final report of the CAB was rendered on February 15, 1962.[1] In it the CAB unanimously concluded that its Rules of Practice were not violated at all and that such violations of its Principles of Practice as were found were not prejudicial and did not deny a fair hearing to any party or otherwise vitiate the proceeding, and were so technical and minor as not to warrant setting aside the route award to American. The case is now before the Court on the amended petitions of United Air Lines, Inc., and Trans World Airlines, Inc., the air carriers that compete with American in the San Francisco-New York market, challenging the CAB's conclusions.

COUNTERSTATEMENT OF THE CASE

The petitioners' treatment of the facts revealed upon the remand is so conclusory and colored as to necessitate a rather full counterstatement.

Summary

The record on remand was developed almost wholly by the CAB's Bureau of Enforcement, the CAB's staff unit especially skilled in and equipped for investigation and prosecution. With close collaboration by the two petitioners, the Bureau made exhaustive searches of American's files and elaborate field inquiries not only of officials and employees of the intervenor City of San Francisco and other civic bodies and of American but among the general citizenry in the areas involved. Moreover, the Bureau was a vigorous prosecutor—it was certainly not an "impartial observer," as Trans World describes it. (Trans World Br., p. 34). The transcript of hearing on remand will show that both in selection of witnesses and in the thrust of examination and cross-examination the Bureau left almost entirely to the City of San Francisco and American the burden of bringing out matters favorable to their positions. We point this out not in complaint but to emphasize that the Court's direction that there be a hearing was most fully complied with and that every conceivable stone was turned over and a microscopic examination made of what was disclosed.

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[1] Tr. 10275 *et seq.* The CAB's final report, or Opinion on Remand, is cited hereinafter as "Op. on Remand, p. ...., Tr. ...." The portions of the Hearing Examiner's Initial Decision adopted by the CAB and made an appendix to its report are cited as "Op. on Remand, App., p. ...., Tr. ...." These and other references to "Tr. ...." are to the certified record in this Court. References to "J.A. ...." are to the Joint Appendix of the original review proceedings.

A very able hearing examiner and a Board that has become intimately familiar over the years with problems of the kind here in question have agreed that nothing done by the City or American differed in any important particular from what has been done by cities and carriers for years in cases like this—done openly, honestly and publicly. (Op. on Remand, App., pp. 99, 133, 139, 153, Tr. 10414, 10448, 10454, 10468).

The CAB adopted the Examiner's finding that, in its own communications to the CAB in the *San Francisco-New York Nonstop Case,* American "scrupulously observed the Board's Rules of Practice [14 C.F.R. Pt. 302] in all respects . . ." (*Id.,* p. 119, Tr. 10434).

The essential controversy was whether American and the City of San Francisco should have conducted themselves on the assumption that the CAB's Principles of Practice, 14 C.F.R. Pt. 300, contemplated that communications to the CAB on the question of determining to *institute* a route licensing case were subject to the procedures applicable when the question is one of deciding the *merits* of such a case. All other questions are quite unsubstantial.

On the basic question, the CAB held that its Principles of Practice, properly interpreted, did apply to the question of instituting a route licensing case, but that the reading of them by the City and American as not so applying was reasonable and in good faith. Because this was a reasonable reading, and because the violations found were "dependent in major part on a technical construction of the Principles of Practice so as to make them applicable to activities prior to the time the proceeding was set down for hearing" (Op. on Remand, p. 26, Tr. 10300), the CAB determined that the proceeding that resulted in the grant of San Francisco-New York nonstop authority to American was not vitiated and the route award should not be set aside. It was held, further, that in the circumstances of the case even if "a comparative demerit" were accorded American on account of its questioned conduct, its selection in preference to the other competing applicant, Northwest Airlines, Inc., would still be dictated by the applicable public interest criteria. This latter conclusion was not off-hand but was reached after full, adversary argument. Northwest participated in the reopened proceeding and strongly argued that American should receive "a comparative demerit" on the issue of selection of carrier.

We shall divide our Counterstatement of the Case into two parts—first, dealing with the period prior to the setting of the *Nonstop Case* for hearing; and, second, dealing with the period thereafter.

A. *THE PERIOD BEFORE THE CASE WAS PENDING.*

1. THE PROCEDURAL HISTORY OF THE INSTITUTION OF THE NONSTOP CASE.

The *Nonstop Case* has significant roots in the years preceding January 1958 when it was instituted.

Prior to 1956 American was permitted to serve San Francisco only on flights making stops at Tulsa, Dallas or points west thereof. As aircraft developed greater range and speed, this restriction increasingly impaired American's ability to compete with United and Trans World for traffic between points east and north of Tulsa, on the one hand, and the San Francisco Bay Area on the other. United, which dominated San Francisco's air service, had served that city without restriction from the early days of air transportation. Trans World had had unrestricted nonstop rights between San Francisco and points to the east for many years.

The competitive situation at San Francisco was quite different from that at Los Angeles. There all three carriers had long had unrestricted rights to the east.

In January 1953 American filed an application to remove the restriction on its service to San Francisco. It was assigned Docket No. 5903. It remained dormant until 1958.

However, in 1953 the CAB activated the *Denver Service Case,* Docket No. 1841, involving transcontinental service via Denver and embracing many applications of a number of carriers covering service over a vast area of the country. In that case the CAB included another application of American which sought authority, among other things, to operate nonstop to San Francisco from Chicago and from points on American's route east of Chicago. The *Denver Case* was decided in late 1955. 22 C.A.B. 1178. While American was authorized to operate nonstop from Chicago its request to nonstop from points east of Chicago was denied. Thus San Francisco remained dependent upon only two transcontinental carriers, United and Trans World, with nonstop rights to eastern points.

On May 3, 1957, American filed a motion requesting the CAB to sever out of its old application in Docket No. 5903 the single issue of San Francisco-New York nonstop authority and to set that issue for immediate hearing. (J.A. 4-20). The City of San Francisco, the Port of New

York Authority and the Port of Oakland supported that motion, without, however, expressing any view that American should be the carrier selected to provide the service. (J.A. 21-22, 43-46; Tr. 40-41). United and Trans World opposed the proposal. (J.A. 26-41, 47-72).

On June 26, 1957, the CAB denied the motion. At the same time it directed its staff to study the problem and report to it by December 1, 1957, on the question of the need for a nonstop proceeding. (J.A. 90-91).

The CAB thereafter sent "a top-level analyst of its Bureau of Air Operations to San Francisco to make a study of the public interest in an early hearing on the nonstop issue." (Op. on Remand, App., p. 48, n. 35, Tr. 10363). This study included interviews with persons in the community. (*Id.*, p. 133, Tr. 10448). The staff study was completed late in 1957; it was an internal staff study, not made available to persons outside the CAB. (*Id.*, p. 48, n. 35, Tr. 10363).

On January 13, 1958, the CAB entered an order setting "for expedited hearing" the San Francisco-New York nonstop issue, severing that single issue out of American's old Docket No. 5903 and opening a new docket limited to that issue, which was assigned Docket No. 9214. (J.A. 97-100). The CAB found that there was warrant for an early hearing on that issue and that such a case would afford an opportunity to investigate for the first time "the imminent impact of the operation of jet aircraft in a market of the size and importance of that involved here." (J.A. 98). United and Trans World asked the CAB to reconsider this order (J.A. 411-38), but on April 9, 1958, reconsideration was denied in an order reiterating the need for prompt consideration of the needs of the San Francisco-New York service and of "the imminent impact" of prospective jet operations. (J.A. 439-46). The CAB was at pains, however, to point out that it was not deciding whether there was a need for additional nonstop service but only that there should be a hearing on that question. To attempt to decide the questions relating to need for the service "at this time would be improper, since those questions can be answered only after evidentiary hearings in which all interested persons are allowed to participate and on the basis of the evidence adduced at those hearings." (J.A. 441).

Neither United nor Trans World nor anyone else had ever filed a petition to intervene in the old Docket No. 5903 prior to the CAB's order of January 13, 1958.

Trans World filed a petition to intervene in the new Docket No. 9214 on January 27, 1958. United filed a similar petition on April 10, 1958. (Op. on Remand, p. 24, n. 59, Tr. 10298). In due course these petitions were granted. (J.A. 451). *Thus for the first time United and Trans World became parties and so became entitled under the CAB's Rules of Practice to receive service of documents filed with the CAB.*[3]

A prehearing conference was held on April 29, 1958. (J.A. 447). Immediately prior thereto Northwest filed an application for a New York-San Francisco nonstop service. (Op. on Remand, p. 24, n. 59, Tr. 10298). (Northwest had a transcontinental route from New York to Seattle not serving San Francisco.) It requested that its application be consolidated into the proceeding and this request was granted. (J.A. 458-59).

It should be emphasized that the CAB's order of January 13, 1958, actually provided for the institution of an entirely new proceeding. It was not even the setting of a pending application for hearing save in the most technical sense.

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[3] Rule 8(a)(2) of the CAB's Rules of Practice requires service on all parties to a proceeding. 14 C.F.R. § 302.8(a)(2). One becomes a party by being named as such by the CAB, by having his own application consolidated into the proceeding or by intervening pursuant to Rule 15, 14 C.F.R. § 302.15.

American's application in Docket No. 5903, dormant since January 1953, sought removal of the San Francisco restriction affecting service between San Francisco and all points east and north of Tulsa on American's extensive route system. While, of course, service between San Francisco and New York was implicit in this, the application was really one for improved service authority between San Francisco and the entire eastern area of the country. But American's proposal in May 1957 had been that a quite different case be instituted, directed specifically and solely to the San Francisco-New York service. What the CAB did in its January 1958 order was to set up, on its own initiative, after its study of the situation and in the light of impending jet developments, an inquiry into that single issue. In no true sense, therefore, was there a "pending" San Francisco-New York case until that order was entered.

2. Activities of American, the City of San Francisco and others prior to institution of the nonstop case.

American endeavored to make its motion for an expeditious hearing widely known in the San Francisco Bay Area by furnishing copies thereof to newsmen and interested citizens and groups. It sought support for the position taken by the City respecting the proposal, which was that the nonstop issue should be heard promptly but with no view expressed on the issue of carrier selection.

The City's position had been determined by its Public Utilities Commission, which, after a public hearing in which United and Trans World appeared in opposition (Tr. 5920-21, 7380), had adopted a resolution to be transmitted to the CAB and its Congressmen. (Tr. 9009). The City sent copies of the resolution to other government bodies in the Bay Area. (Tr. 7479-80).

The Chamber of Commerce of San Francisco, after hearing representatives of United, Trans World and

American, among others, decided to support the City. (Tr. 5927-29, 7283-84). It sent a letter to this effect to the CAB and its Congressmen, as was its regular practice. (J.A. 208, 226; Tr. 7283-84).

American undertook to ask other chambers of commerce in the area to take similar action. (Tr. 5813-18, 5850-54). It drafted a resolution expressing support of the City's position (Tr. 7541-42) and had its sales representatives in the various surrounding localities ask chambers to adopt such a resolution and send it to the CAB and their Congressmen. (The salesmen in one local office may have asked two or three travel agents in their zone to communicate their support of the proposal for a hearing to the CAB or their Congressmen [see Op. on Remand, App., pp. 33-36, Tr. 10348-51]; if so this was done without the knowledge of the American representative having charge of this effort [Tr. 6210-11].)

A number of the other government bodies and chambers in the area did take the requested action. (*E.g.*, J.A. 23-25, 41-43, 72-74, 79-90, 102, 105-6, 200-1, 225, 227, 312-17). Many of them sent their resolutions to the Mayor of San Francisco instead of directly to the CAB.

The Mayor wrote five letters to the CAB, three of them transmitting such resolutions and numerous newspaper clippings of both an editorial and a news nature. (J.A. 75-77, 110, 229-41, 254-70, 290-304). He sent copies of one of these letters (dated May 29, 1957) to United and Trans World. (J.A. 75-77). It referred to "the documents already forwarded to you from citizens, municipalities and civic organizations from Northern California . . ." and stated that the Mayor was attaching a "list of these citizens, municipalities and civic organizations." (The list is at J.A. 77).

The Governor of California also wrote the CAB. (J.A. 221). This was reported in the press. (J.A. 300-1).

Actually the whole "campaign" was extensively publicized in the press for there was widespread interest. (Op. on Remand, App., p. 44, Tr. 10359).

American advised Congressmen from the New York area of its motion and of the City's action. (Tr. 5617-22, 5626, 5631, 5640-41, 5643, 5661-63). It did not request them to do anything but, if they asked whether they could do anything, they were told by American's representative that it would be appropriate to write a letter to the CAB. (Tr. 5619-20, 5622-24).

Several Congressmen did write the CAB in support of the proposal that there be a hearing on the San Francisco-New York issue. (*E.g.*, J.A. 277, 288, 329-30, 340-41, 342, 346, 348-49, 351, 355, 357-58, 363, 365, 367, 372, 373).

All these miscellaneous communications, in accordance with long established CAB procedure, were placed in the public correspondence file in Docket No. 5903. This file was open to the public.

All this had occurred before the CAB denied American's motion in late June 1957.

The very large majority of the communcations alleged to be ex parte occurred during this period.

Thereafter and until January 1958, when the CAB ordered the new docket instituted and provided that there would be a hearing on the San Francisco-New York nonstop issue, a few additional communications were received by the CAB. Most of them were from Congressmen from the Bay Area expressing continued interest and the hope that the CAB would grant the requested hearing. (Op. on Remand, App., pp. 49-50, Tr. 10364-65). Of course all these communications also went into the public correspondence file.

In the course of their effort to encourage support neither American nor the City advised other persons that their resolutions and letters could be filed with the CAB only pursuant to the CAB rules for formal proceedings. As American's witnesses testified candidly in the remanded proceeding, it was their understanding that those rules did not apply to communications of this nature before any case had been set for hearing. (Op. on Remand, pp. 26-27, Tr. 10300-1; *id.*, App., pp. 126-27, Tr. 10441-42; Tr. 5679-81, 6135-36, 6476-77, 7708).

The only other event of significance during this period[8] is the conference of December 2, 1957, that representatives of the City held with the CAB. (The details summarized below are set out in Op. on Remand, App., pp. 55-58, Tr. 10370-73.)

The CAB had long had the practice of conferring with cities on their aviation problems. A transcript of such a conference would be taken, and it would be made available to interested carriers on request.

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[8] While not material, we should note a mistake made by the CAB at p. 18, n. 37, of its Opinion on Remand, Tr. 10292. The petitioners have laid great stress on a news item in the San Francisco press reporting on a luncheon addressed by Mr. C. R. Smith, President of American, in November 1957; in this item it was stated that, in connection with the nonstop matter, Mr. Smith had said that "you have to keep hammering . . . if you want to get anywhere." (Op. on Remand, App., p. 54, Tr. 10369). The CAB opinion's footnote states that this was said "at a luncheon to which members of the press and others were invited." This is inaccurate; the evidence is perfectly clear. There was a luncheon attended by a number of San Francisco's leading citizens, including some newspaper publishers (not reporters), which was identical with luncheons that Mr. Smith and other officials of American were holding in key cities all around American's system at that time. The purpose of all those meetings was to acquaint each of the cities with the imminent revolutionary developments in jet transportation, the progress in the manufacture of the jets, the time when they would be placed in service, the kind of transportation they would provide, and so on. Mr. Smith's remarks at the luncheon dealt solely with that subject and did not even mention the nonstop matter. *After* the luncheon, in an informal conversation, someone asked Mr. Smith about the nonstop hearing that the City had been seeking and it was to this question that Mr. Smith in reply said something along the lines of the statement later appearing in the press. (Tr. 5826-30, 5837, 5841-43, 7704-6).

In November of 1957 the City of Orlando and the City of Houston each had such a conference with the CAB, in which each city urged that the CAB set for hearing a *Southern Transcontinental Route Case* involving a number of pending route applications. American knew that these conferences were scheduled and suggested to the City of San Francisco that it might seek a similar conference with the CAB. (Tr. 6184).

The City determined to do so. It sent its regular legislative representative in Sacramento to Washington to discuss the matter with its Congressmen and designated two representatives to attend such a conference if one were granted. Through its Congressmen the request for the conference was made and it was held on December 2. That it was to be held was publicized in the San Francisco press in advance, and it was announced also in the trade press. United and Trans World secured transcripts of the conference subsequently in the usual way. The transcript ran to 17 pages. (J.A. 973-86).

At the outset of this conference the Chairman of the CAB severely reprimanded one of the City's representatives for a remark made by him, and reported in the press, at a public hearing before the Board of Supervisors when authorization had been sought to arrange for the conference. His statement was to the effect that the CAB had to be "pressured." The City representative apologized for the remark and acknowledged that it reflected a very poor choice of words in response to hostile questioning. He explained that what he had meant to say was that, in seeking a hearing, the City should rely on all legitimate channels, which included its Congressmen, in presenting its request. He offered to and did issue a statement, which was published in the San Francisco press, correcting his previous statement; he worked this out with one of his Senators immediately after the conference with the CAB.

When the petitioners first raised the question of alleged ex parte communications—in petitions for reconsideration to the CAB after they had lost the *Nonstop Case*—they sought to give the impression that they had not known of these communications until just before filing their petitions. One thing overwhelmingly established on the remand is that they were fully on notice of them from the outset and had actual direct knowledge of most of them—in addition to the fact that they were all placed in the public correspondence file of the pertinent docket, a well-known public repository for communications of this nature. (Op. on Remand, App., pp. 22-23, 45, 46, 132, 150, Tr. 10337-38, 10360, 10361, 10447, 10465).

United and Trans World knew of the San Francisco Public Utilities Commission resolution and indeed appeared at the public hearing in opposition to it. (*Supra,* p. 8; Op. on Remand, App., pp. 22-23, Tr. 10337-38). That resolution announced that it was to be sent to the CAB and to Congressmen and other interested persons. (Tr. 9009). United and Trans World participated in opposition to the position taken by the San Francisco Chamber of Commerce and received copies of its letter to the CAB and to Congressmen. (Op. on Remand, App. pp. 27-28, Tr. 10342-, 43; Tr. 7339-40, 9096-97). United was very highly placed in the governing body of San Francisco's Downtown Association and of course knew of its transmittal to the CAB and its Congressmen. (*Id.,* pp. 31-33, Tr. 10346-48; Tr. 7191). These carriers also received copies of or were otherwise informed of a number of other such communications. (J.A. 75-77, 296; Tr. 7685). The Mayor's letter of May 29, 1957 (J.A. 75-77), of which copies went to United and Trans World, actually provided them with a list of the municipal bodies, organizations and individuals who had sent communications. Finally, the press was reporting the whole matter (Op. on Remand, App., p. 46, Tr. 10361); certainly there was no secret about the interest of the members of Congress.

In short, in none of this effort was there anything concealed or private. On the contrary it was a well-known, openly conducted civic effort—and United and Trans World were not only fully aware of it but were actually participating in it as opponents in various civic forums.

B. *THE PERIOD WHILE THE CASE WAS PENDING.*

From the time the CAB instituted the *Nonstop Case* by its order of January 1958 American regarded the matter as in a new posture, and its senior executive having responsibility for the case specifically cautioned its people to take care that the CAB's procedural rules and principles were adhered to. (Tr. 7708).

There is not the slightest evidence that American sought any communications to the CAB except in accordance with the established formal channels.

The public correspondence file for the period from January 1958 to the end of the case contains a substantial number of pages, but a very large fraction thereof is composed of written statements and letters sent by Congressmen in lieu of their appearance at oral argument to the CAB, which was held in April 1959. (Op. on Remand, App., pp. 61-62, 75-76, Tr. 10376-77, 10390-91). United makes no complaint as to these communications in lieu of oral argument (United Br., p. 8, n. *) and Trans World now complains not of such communications but of certain activities of American in connection with asking the Congressmen to interest themselves in the oral argument (Trans World Br., p. 21). We will deal with that matter later.

United and Trans World do complain, however, of some of the communications, other than those sent in lieu of a personal appearance at the oral argument, that were sent during this period. United says there were fifteen and Trans World says there were twelve objectionable communications.[4] (United Br., p. 8; Trans World Br., p. 21). Neither petitioner cites to the record in such a way as to make it possible to identify what it is complaining about. The fact is that the communications other than those in lieu of an appearance at oral argument were the normal status inquiries, inquiries or complaints about delay, non-committal transmittals and so on.[5] There is not a shred of evidence that American had anything to do with them.

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[4] Trans World says that all the communications of which it complains were from Congressmen, but United may include in its group of 15 communications a telegram from the Mayor of San Francisco to the Board dated June 23, 1958, which was not served on other parties. (J.A. 114). San Francisco became a party to the case on May 7, 1958 (J.A. 451), and this is the only ex parte communication by a party at any time during the proceeding. The telegram was placed in the public correspondence file. The Examiner found the telegram unobjectionable because it dealt solely with a matter of procedure. (Op. on Remand, App., pp. 113-14, Tr. 10428-29). The CAB disagreed but did not regard the telegram as significant. (Op. on Remand, pp. 21-22, Tr. 10295-96). This is quite understandable, since the Mayor merely said that an order putting over the hearings at which carrier witnesses would be heard until September "appears to nullify expedited hearings." He requested, alternatively, that the hearings start July 15 and be concluded in July, or that if they started July 30, as then scheduled, they continue without interruption to a conclusion.

[5] United merely refers to the four pages of the Examiner's Initial Decision on which he lists and describes all communications in the public correspondence file dated after the case was instituted. (Op. on Remand, App., pp. 61-62, 75-76, Tr. 10376-77, 10390-91). The listing at the latter two pages is devoted almost exclusively to Congressional statements in lieu of oral argument, of which United does not complain. Trans World cites to the *entire* public correspondence file in Docket No. 9214, although its complaint is restricted to a limited number of unspecified letters from Congressmen. Possibly one can get a hint of what Trans World may be driving at elsewhere in its brief, where it refers to a list of 25 (actually 24) communications it previously filed in this Court and gives a footnote citation to them. (Br., p. 15, n.*). Of the 24 communications, 15 are dated prior to January 13, 1958. Of the remaining nine, five are statements in lieu of oral argument, of which Trans World no longer complains, and the remaining four (not 12)—all from Congressmen—are inquiries or complaints about delay (J.A. 123, 132, 137, 139). The petitioners' treatment of this matter is typical of the broad-brush, epithetical way—featuring frequent reiteration of the phrase "ex parte"—in which they have dealt with the facts of record throughout the proceeding, with what seems a studied failure to cite the record on specific points.

If the Court wishes to examine the communications, the Findings and Conclusions Proposed by American Airlines, Inc., filed with the Examiner and

As for American's press activities during this period, they were no different from normal press activities. They consisted of the issuance of memoranda to editors or press releases on four occasions: (1) when the exhibits in the case were filed; (2) when a session of the evidentiary hearing was about to be held in San Francisco; (3) when a session of the evidentiary hearing was about to be held in Washington; and (4) when the briefs to the Board were filed. (Op. on Remand, App., pp. 62-63, Tr. 10377-78; Tr. 9069). Every one of these "handouts"—issued by its local public relations man in San Francisco—was simply the conversion into more convenient form of the material in the exhibits and briefs for the use of newspapermen and the provision of certain conventional information, such as the history of the case, the hearing dates, the nature of witnesses to be heard and the positions of the parties.

Otherwise there were only two episodes relating to the press that need any reference.

The Initial Decision mistakenly stated that officials of American made elaborate plans to secure the impact on the CAB of favorable publicity when the initial decision in the *Nonstop Case* was issued. As the CAB points out in its opinion, there was only one American official involved. (Op. on Remand, p. 5, n. 10, Tr. 10279). The evidence shows that what happened was this—*and only this:*

An official of American, whose experience with American had been limited to dealing with Congressional matters, had been promoted to head American's Washington office.

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dated November 21, 1960, will be found useful. Appendix A of that document (Tr. 9418-22) is a complete summary of the entire correspondence file, with appropriate references. Page 5 of that Appendix (Tr. 9422) gives a listing and brief description of all the communications after January 13, 1958.

Also of possible use to the Court would be Appendix B of that document (Tr. 9423-24), which in two pages gives a complete calendar and chronology of the *Nonstop Case.*

He was still new in his job as the time approached when he thought that an initial decision in the *Nonstop Case* would probably be issued. (Tr. 5565-66, 5672). There was to be a staff meeting in New York, and he sent to the secretary of the meeting a memorandum suggesting a number of items to go on the agenda. One item he suggested was securing publicity favorable to American on the initial decision in a way to assure that the "full impact of the publicity should go to the CAB . . ." (Tr. 8914). But there is not the slightest evidence that the item was included on the agenda; the evidence is to the contrary. (Tr. 5669). And the fact is that there was no such publicity effort.

The second episode has to do with one of American's local officials on the West Coast.

There had been exceedingly great interest on the part of the City of San Francisco in a conclusion of the *Nonstop Case* by the end of 1958 because jet service was to be inaugurated by American late that year or early in 1959. This service would have an immediate, dramatic effect on the attractiveness of nonstop transcontinental service and on the long rivalry between Los Angeles and San Francisco for the routing of transcontinental traffic.

The CAB's order of January 1958 called for an expedited, prompt hearing. But no prehearing conference was held until April 29, 1958. Only then were procedural dates set. These dates called for all exhibits to be filed by June 30, 1958, with the evidentiary hearing to be held in July. (J.A. 450). Adherence to this schedule would have just about provided the minimum time necessary for a final decision by the end of the year.

However, United, Trans World and the CAB staff requested postponement of the exhibit dates. The City and American opposed. A postponement was granted (J.A. 460) which in turn necessitated a postponement of the evidentiary hearing such that it could not possibly be concluded until after the CAB's August recess (Tr. 718, 719), thus finally eliminating all possibility of having a decision in the case in time to catch up with the inauguration of jet service.

At this time, in June 1958, American's West Coast regional official was engaged in a program of get-togethers with leading citizens in the Bay Area to improve American's traffic position, which was then very weak. (Tr. 6573, 6611-12). He had a luncheon for this purpose with several persons in San Francisco, which by coincidence was on the day that the announcement of the postponement of the hearing was received. (Tr. 6612). Guests at this luncheon happened to include two newspapermen and the City Attorney. The latter brought to the luncheon the news of the postponement. This news was very disappointing to those at the luncheon table. (*Ibid.*) Shortly thereafter editorials appeared in two newspapers that were highly critical of the CAB's delays. (Tr. 8988-89).

Later, American's regional official sent copies of the editorials to an American official in New York enclosed with a memorandum reporting on the luncheon and the state of his efforts to increase American's acquaintance in the Bay Area. In referring to the newspaper editorials he described them as a "direct consequence of the conversation at the luncheon." (Tr. 8987). This, however, meant only that it was at the luncheon that the news of the postponement had been received. The editorials were not based on anything said by American officials at the luncheon, they were not suggested by American, and, indeed, American had nothing to do with them. The evidence is undisputed. (Tr. 6612-13).

We turn finally to Trans World's complaint that American improperly indirectly solicited Congressmen to appear at the oral argument. (Trans World Br., p. 21).

Until a recent change in its rules, the CAB had always permitted Congressmen to appear at oral argument and make statements. This is a practice that has by no means been confined to the CAB; for example, the ICC permits it. *Hearings on H.R. 14 before the House Committee on Interstate and Foreign Commerce,* 87th Cong., 1st Sess. 65 (1961). The practice was upheld in *Eastern Air Lines* v. *CAB,* 271 F. 2d 752, 760 (2d Cir. 1959). The CAB in this case has reaffirmed the propriety of the practice as of the time of the case. (Op. on Remand, p. 19, Tr. 10293).

In this connection the CAB always permitted Congressmen to submit written statements or letters in lieu of an oral appearance. (*Id.,* App., p. 79, Tr. 10394). This was to serve the convenience of Congressmen who might have had conflicting engagements on the Hill or might have been out of town, ill, etc. This, too, has been held by the CAB in this case to be proper (*id.,* p. 19, Tr. 10293), and neither petitioner challenges the practice.

The result of this practice was that cities and carriers kept Congressmen informed of cases of interest and as oral argument time approached suggested to them and sometimes urged that they appear or send a written statement. (*Id.,* App., p. 77, Tr. 10392). In the *Eastern Air Lines* case, it was contended by one of the petitioners that such solicitation was improper, but the contention was rejected, and no complaint is made about the practice itself in this case.

Trans World, however, urges that American "overstepped the bounds of propriety" in its solicitation because it asked some of its customers in the New York area to write their Congressmen in support of American. Trans World's point is not clear, but the facts are.

In one of the Congressional offices it had once been suggested to an American representative that it would help a Congressman to decide whether to appear at such an argument if he knew whether there was interest in a pending case in his home community. (Tr. 5661, 5729-33). American's representative passed this suggestion on to one of American's officials in New York. He, in turn, telephoned one of American's sales officials suggesting the possibility that American's sales representatives in the New York area, in their regular calls on their larger users of air transportation, might inquire whether there was interest in the nonstop question and, if so, suggest to the customer that he communicate with his Congressman asking that he appear at the oral argument. (Op. on Remand, App., p. 77, Tr. 10392; Tr. 6400-5).

The CAB's Bureau questioned all the American personnel involved in this matter very critically and thoroughly; what happened is perfectly clear. (Tr. 6091-6132, 6228-73). The sales official to whom this suggestion had been made passed it along to his subordinates, who transmitted it to some of their sales representatives; but, in carrying out the suggestion, some of the salesmen apparently merely suggested that if a customer were interested he might "write his Congressman"—without specifying the matter of oral argument.

Seemingly a few customers did so—principally travel agents. In five cases the Congressmen simply forwarded the very brief telegram or letter on to the CAB with a transmittal slip or other noncommittal message. (J.A. 141-42, 146-49, 191-92). They were placed in the public correspondence file.

Conclusion

The petitioners seek to foster the impression that this case was accompanied by a barrage of ex parte communications from start to finish. Such an impression, as we have shown, is a gross distortion. Any so-called "barrage" was confined to the May-June 1957 period, at the end of which the CAB *denied* the request for a hearing.

After that time the communications were a thin trickle—to borrow the Examiner's words (Op. on Remand, App., p. 151, Tr. 10466)—and, it is fair to say, a much thinner trickle than in the normal case of excited public interest. Nor can the petitioners point to a syllable of evidence that American sought to foster even a drop of that trickle (other than the concededly proper Congressional statements in lieu of argument) after a case was pending.

There is no evidence whatever of any significant communication to the CAB of any kind that did not go into the public correspondence file, which is included in this record.[6]

There is not the slightest basis for the innuendo the petitioners have persisted in repeating that the press of San Francisco was conducting a steady campaign of villification of the CAB, fostered by American. Not only is there a complete want of evidence of any fostering by American, but there is no evidence whatever of any such campaign. The isolated episode in June 1958, *supra*, p. 18, and one other single editorial outburst when, in late January 1959, Los Angeles received jet nonstop service to New York before San Francisco did (no doubt construed to be a monotonous repetition of San Francisco's historic subordination to Los Angeles) (Tr. 9095) are the *only* instances shown in the record of any such press criticism as the petitioners imply but nowhere prove. And in neither instance is there any showing that either American or the City was in any degree responsible.

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[6] At one point in these proceedings Trans World made a half-hearted contention that the public correspondence file did not disclose all the communications because in some instances the file showed that a communication had been returned to the sender. No effort was made by Trans World or anyone else to prove that any such communications were of any significance. And American's brief to the Examiner fully disposed of Trans World's contention. (Findings and Conclusions Proposed by American Airlines, Inc., Nov. 21, 1960, p. 8, n. 1, Tr. 9347-48). In this Court Trans World no longer pursues that contention but shifts to another one, *i.e.*, that five letters to people in San Francisco from their Congressmen show that there had been Congressional "contacts" with the CAB that were not reflected in the public correspondence file. (See Trans World Br., p. 16). These polite letters to constituents all were written during May and June 1957. We can only ask the Court to read the actual letters—the citations are given in Trans World's brief—instead of the carefully excised partial quotations given by Trans World. It will be seen that this hearsay "evidence" reflects nothing whatever except the normal status inquiries that are completely harmless, that go from Capitol Hill to all the administrative agencies in a constant flow, and that bars against ex parte communications always except. It is no wonder that neither Trans World nor anyone else sought to secure evidence of what those "contacts" were. The record abundantly sustains the Examiner's finding, with which the CAB agreed, that there were no "significant communications to the Board which were not duly filed in the public correspondence dockets of the nonstop proceeding." (Op. on Remand, App., p. 124, Tr. 10439).

Finally it should be emphasized that this record demonstrates beyond question that there was no secret passing of evidence to the CAB—as there was to the FCC in some of the FCC influence cases. Nor was there any furtive or clandestine contact or attempted contact, direct or indirect.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958 and of the Civil Aeronautics Board's Regulations are set out in an appendix to this brief.

SUMMARY OF ARGUMENT

I

The petitioners had a fair hearing and were not denied due process. The petitioners' suggestion that the CAB was prejudiced by communications it received prior to the institution of the *San Francisco-New York Nonstop Case* urging a prompt hearing in the matter is without merit. The CAB based its decision on the record made in open hearing. Moreover, an administrative agency does not deny due process even if it has reached conclusions before a case is heard—as the CAB expressly disclaimed doing here—if thereafter it affords a full hearing in which its conclusions are re-examined. Such a hearing was afforded here.

II

The intervenors American and the City of San Francisco were fully warranted in reading the CAB's Principles of Practice as not being applicable before an air carrier certificate or certificate amendment application has been set for hearing.

This is indicated by the informality of the CAB's dealing with the matter of the order in which the numerous certificate and certificate amendment applications received by the CAB are to be heard. The CAB receives written and oral representations as to air service needs and sometimes, as it did in this case, has its staff study such needs before determining whether to institute a route case in which carriers' applications or portions thereof will be heard.

Until a notice of prehearing conference or order instituting a route case is issued, an application for a certificate or amendment of a certificate is an inchoate item. It is impossible to tell when such an application will be heard, if at all, or in what form it will be prosecuted, until a route proceeding is thus instituted. In no real sense does the mere filing of an application begin a proceeding.

Pending legislation, reflecting the views of the congressional committee perhaps the most knowledgeable in regulatory matters, legal scholars, the bar and representatives of the agencies themselves, confirms this realistic view; it would forbid ex parte communications only after a proceeding to be decided upon a record has been noticed for hearing.

The CAB in this case has construed its Principles of Practice as applying to the period before a hearing was ordered, but it has recognized that American's and San Francisco's contrary reading was reasonable. The CAB's own ex post facto interpretation of its rules is dubious and is difficult, if not impossible, to square with the statutory right of any interested person to file a memorandum in support of a certificate or a certificate amendment application—a right the exercise of which the CAB had not sought to regulate.

The great bulk of the so-called ex parte communications to which petitioners point were sent during the period before the *Nonstop Case* had become a reality and were directed to the matter of an expeditious hearing. The activities of American and San Francisco that helped produce these communications were carried on in complete good faith and had in them nothing of the clandestine; instead wide publicity was sought.

In light of the foregoing considerations the CAB was eminently correct in concluding that there should be no sanction upon American for the technical violations it found.

III

American's publicity and public relations program in connection with the *Nonstop Case*, found objectionable by the CAB in light of its Principles of Practice, though not so seriously as to require any action against American, was in fact eminently proper.

Before the case was instituted, American, on the view of the applicability of the CAB's procedural rules it reasonably took, sought broad community and civic support and to this end naturally attempted to enlist the aid of the press. The San Francisco Bay Area newspapers were deeply interested in the matter in any event, and the nonstop issue gave American an opportunity to become better and more favorably known in the Bay Area, where it then was in the shadow of its much stronger rival, United.

After the case was instituted, American issued just two press relases and two memoranda to editors digesting material submitted in the case that was of public record in any event, merely for the convenience of the press and to meet the constant requests of newsmen whose editors were interested in detailed coverage of the case.

Neither American nor San Francisco was shown to be responsible for criticism of the CAB that appeared in the press, the volume of which in any case has been grossly exaggerated.

IV

Other questioned activities of American after the case was instituted, other than the press activities heretofore described, were quite properly dismissed by the CAB as inconsequential.

V

The CAB has decided that the nonstop service of American in the San Francisco-New York market is needed. Should this Court be of the view that further proceedings before the CAB are necessary, it should not—and certainly not on the basis of the meager statistics supplied in United's brief—order that service terminated pending the conclusion of any further proceedings that are held.

ARGUMENT

I. THE PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW

Each of the petitioners makes an argument, cast in terms of denial of due process of law, that it did not receive a fair hearing.

It seems to be suggested by the petitioners that the CAB was prejudiced against them by the communications it had received prior to January 1958 in support of the proposal that there be a hearing, and that this prejudice carried over to blind the CAB in its decision more than a year and a half later on the merits of the case made on the hearing record. (Trans World Br., pp. 25-26). But judges often issue show cause orders on the basis of ex parte presentations, and due process is not denied when the ultimate decision is reached after a full hearing. And the Supreme Court has long since rejected the argument that due process is denied by an administrative agency because it has investigated a matter and even reached a conclusion before it holds a hearing; if it affords a full and honest hearing and re-examines its a priori conclusions due process is afforded. *FTC* v. *Cement Institute,* 333 U.S. 683, 700-3 (1948); *United States* v. *Morgan,* 313 U.S. 409, 420-21 (1941).[7]

Here, as we have seen, the CAB was careful at the very outset to make it clear that its ultimate decision could not be based upon its prior exposure to the matter but would be based entirely upon what interested parties brought forward at the later hearing. (*Supra,* pp. 6-7). And after the conclusion of the hearing the CAB twice emphasized that its members were not prejudiced and that its judgment was based solely on the hearing record. (J.A. 945-46, 964; Op. on Remand, p. 29, Tr. 10303).

Nor is there in this case any showing of the situation in *Sangamon Valley Television Corp.* v. *United States,* 106 U.S. App. D.C. 30, 269 F. 2d 221 (1959), and U.S. App.

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[7] *Cf.* Phillips v. SEC, 153 F.2d 27, 32 (2d Cir. 1946), *cert. denied,* 328 U.S. 860 (1946) (ex parte discussion leading to development of an agency view on a key issue prior to hearing held not to vitiate subsequent decision after full hearing); In re American & Foreign Power Co., 80 F. Supp. 514, 525 (D. Me. 1948). It is of interest that the late Judge Frank, when he was SEC Chairman, was responsible for the development of quite extensive pre-case ex parte treatment of the sort sustained in the *Phillips* case; not only was he himself proud of such pre-case treatment but he was commended by the Attorney General's Committee on Administrative Procedure. See Hearings on H.R. 14 before House Committee on Interstate and Foreign Commerce, 87th Cong., 1st Sess. 103, n. 1 (1961).

D.C. , 294 F. 2d 742 (1961), where, after the only process afforded interested parties for submitting pertinent factual evidence, one of the parties, in addition to various other shenanigans, submitted to FCC members most important and decisive factual matter in secret. In this case not only does it affirmatively appear that the CAB based its decision solely on the record made in open hearing, but the petitioners have pointed to nothing in the so-called ex parte submissions that was of any significance to the decisive issues in the case or that was not exhaustively examined at the hearing.

II. THE INTERVENORS WERE NOT CULPABLE IN ACTING ON THE ASSUMPTION THAT THE CAB'S FORMAL PROCEDURES WERE NOT APPLICABLE TO THE PRE-CASE STAGE

The CAB, in its November 1959 opinion on reconsideration in the *Nonstop Case,* construed its formal procedures as applicable to communications with it on the question whether a case should be set for hearing. (J.A. 951). No such interpretation had ever before been rendered. And, as the CAB has held in its opinion on the remand, the contrary interpretation adhered to by the intervenors in 1957 was a reasonable reading, in good faith, of its Rules and Principles of Practice as they were then worded. (Op. on Remand, p. 27, Tr. 10301).

The reasonableness of the intervenors' reading is confirmed by the way the CAB, under the statute, had always dealt with the matter of activating a route case. Ever since its creation two decades earlier, it had dealt with this matter in the following wholly informal manner:

Under Section 401 of the Federal Aviation Act certificates authorizing the provision of common-carrier air service are issued upon application and after notice and hearing. Amendments to existing certificates may be made on petition or complaint or on the Board's own initiative, again after notice and hearing. The statute permits the CAB by regulation to require certificate applications to be served upon interested persons and to determine to what persons it will give notice of the filing of applications, but no implementing regulations are in effect.[8] Notice to the public is effected by posting a copy of a certificate application in the CAB's office pursuant to Section 401(c) of the Act, and the CAB publishes a weekly summary of applications, petitions, complaints and the like, including certificate and certificate amendment applications, that have been filed with it, to which interested persons subscribe. (Op. on Remand, p. 4, n. 8, Tr. 10278).

Section 401(c), relating to certificate applications, provides that "any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate." Section 401(g), relating to certificate amendments, provides that "any interested person may file with the Board a protest or memorandum in support of or in opposition to" the amendment of a certificate. When this case arose the CAB had not adopted any regulations purporting to govern the exercise of this statutory right to file a protest or memorandum. (Op. on Remand, App., pp. 105-11, Tr. 10420-26).

Since there is a practical limit to the number of cases the CAB can hear, but no limit to the number of applications that can be filed, there is always a huge backlog of scores of certificate applications and certificate amendment applications that have not been set for hearing.

Upon filing, an application receives an individual docket number. Though at the time this case arose the CAB theoretically made some effort to set applications for hearing in a sequence determined by date of filing, in practice, as the CAB has pointed out, the "priority-of-filing policy seldom has a chance to operate," and most applications have been set for hearing according to considerations having nothing to do with the date of filing.[9] (J.A. 802-3).

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[8] The absence of implementing regulations is no oversight. The fact is that in its very early days the CAB did require service of applications, but this requirement was dropped because it was both impractical and quite useless. (Op. on Remand, p. 4, n. 8, Tr. 10278).

At the time of this case there was no established procedure for determining what application should be set for hearing at a particular time. The CAB's staff would study the needs of communities and of areas, formally or informally, and discuss the matter with the CAB. Carriers would discuss the problem with the CAB and the staff. Cities would communicate with the CAB on the subject by letter or orally. Not infrequently the CAB would hold a conference with civic representatives concerning their needs and thereafter make available a transcript of such conference to any interested carrier. Sometimes a city or a carrier would seek to focus attention on a problem by filing a motion with the CAB requesting that a particular proposal be set for hearing. State officials and Congressmen often urged action by the CAB, both in oral and in written communications. Members of the public would often write to the CAB concerning their interest in air services.

When the CAB determines to give attention to a particular application or group of applications, or to the needs of a particular city or area without regard to particular applications, often a notice of prehearing conference is issued specifying the matters to be considered. At other times the CAB issues a formal order setting a case for hearing with a tentative statement as to the geographical boundaries of the case and the services to be considered. This also is followed by a prehearing conference.

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[9] Recently the CAB, recognizing that the exceptions had swallowed the theoretical rule, has proposed to amend its regulations to provide for dismissal of stale certificate applications and to state standards for determining priorities of hearing that have nothing to do with priority of filing. 26 Fed. Reg. 11841 (1961).

In both cases, carriers desiring to have applications included in the proceeding which have not been covered in the notice are supposed to file such applications, with motions to consolidate, or, if they already have applications on file, to file motions to consolidate, at or before the prehearing conference.

The prehearing conference is conducted by a hearing examiner. He canvasses the positions of the parties as to the desired scope of the proceeding, taking the CAB's notice of the conference or its initial order as a baseline. The matter is then referred by the examiner to the CAB, which studies the question further and finally issues a consolidation order specifying what applications are to be heard, what interventions are permitted and what the scope of the case will be. After the consolidation order is issued, there occur the regular procedural steps in the case: advance exchange of exhibits, advance exchange of rebuttal exhibits, advance exchange of written testimony, evidentiary hearing and so on.

The important thing is that until the notice of prehearing conference, or the order initiating the case, an application for a certificate or for an amendment of a certificate is at most an inchoate item. In fact, many and probably most applications are never heard by the CAB in the form in which they are filed. As proceedings are activated, portions of or issues in applications will be "severed out" and given a new docket number by the CAB in order to comport with some proceeding fashioned by the CAB which does not fit the original application at all. Indeed, today when there is such a severance the rest of the original application is dismissed. 14 C.F.R. § 302.12(d).

Consequently when an application is filed no one can tell, even approximately, who the parties will be in any proceeding in which the application or some part of it is ultimately heard; or what the issues will be in such a proceeding; or when a proceeding will be conducted (it may be five or ten years in the future); or, in fact, whether there ever will be a proceeding involving that application.

In no real sense, therefore, does the mere filing of an application begin a proceeding. (J.A. 951). It merely indicates that the applicant *maybe* will *some time* be seeking the service or some part of the service embraced in the application.

The situation was aptly put by Professor William K. Jones very recently in his preliminary draft of report on *Licensing of Domestic Air Transportation by the Civil Aeronautics Board,* prepared as the Reporter for the Committee on Licenses and Authorizations of the Administrative Conference of the United States, March 1962, p. 36:

> "The net result is that a proceeding is not really started until a notice of prehearing conference (or some substitute) manifests Board intention to consider particular applications or additional air transportation needs between designated points. It is the Board and not the applicant which, in a realistic sense, controls the initiation of licensing proceedings."

It is especially to be noted that under the CAB's Rules of Practice another carrier or a city becomes a party to a given docket *only* by intervening therein. And service of documents in a given docket is required *only* on parties thereto. (Op. on Remand, p. 31, Tr. 10305; *supra,* p. 7, n. 2). While there is nothing to prevent a person from filing a petition to intervene at any time after an application is filed, rarely is this done until the prehearing conference has been set.

Actually, in the case of American's dormant Docket No. 5903, neither United nor Trans World—nor, indeed, anyone else—ever filed a petition to intervene therein, and therefore neither of them ever became a party entitled to receive service of documents. United and Trans World filed no petitions to intervene until after the CAB entered its order setting up the new Docket No. 9214 in January 1958, although they had been fully on notice of Docket No. 5903 and of prospective activity therein at least since the spring of 1957 and had "direct notice of many" of the ex parte communications going to the CAB. (Op. on Remand, App., p. 132, Tr. 10447; see *supra*, p. 13). By failing even to file petitions to intervene United and Trans World certainly acquiesced in the informality of procedure.

The permissible informality of communications with the CAB on the question of setting a case for hearing is conclusively demonstrated by the fact that, in denying American's proposal in June 1957, the CAB, by public order, provided for a staff study of the question and then sent one of its representatives to San Francisco *to communicate ex parte* with people in the community on the subject. (*Supra*, p. 6).

Not even now has either United or Trans World so much as suggested that the CAB was wrong in thus seeking ex parte communications. It is a strange canon of interpretation that *permits* the CAB to seek ex parte communications but *forbids* an interested person—be he Mayor, city or county legislative body, Governor, Congressman, chamber of commerce or private carrier—from making an ex parte communication to the CAB on the selfsame subject, especially when, in the latter cases, the communication goes into a public correspondence file available to all the world.

The reasonableness of the intervenors' understanding, as of 1957, is further confirmed by the House Committee on Interstate and Foreign Commerce. That is the committee that made the disclosures leading to the FCC "influence" cases. That is the committee that was chiefly responsible for the Civil Aeronautics Act—predecessor to the Federal Aviation Act. That is the committee that has more expertise than any other legislative or judicial agency in the problems of administrative law generally. That is the committee that has been engaged for several years in an intensive study of administrative procedures with a special staff, mobilizing to its aid legal and governmental scholars, the organized bar of the nation, specialized bars and agency representatives. That is the committee that has concentrated on the problem of the ex parte communication in the business of the quasi-legislative and quasi-judicial agencies and has formulated, from a welter of study, experience and extensive hearings, a bill to deal with the subject. That is the committee that unanimously reported with favor a bill that would outlaw ex parte communications. The bill bears the number H.R. 14 in the current Congress.

And that bill provides that its prohibitions will apply to a proceeding that is to be decided on a record before the CAB or one of the other principal administrative agencies "*only beginning with . . . the time that such proceeding has been noticed for hearing*" unless the agency specifically determines that the issues in a proceeding call for earlier application thereof and gives notice of such determination "*in the same manner that notice of hearing would be given* . . . ." See H.R. 14, 87th Cong., 1st Sess. §§ 2(3), 6. (Emphasis added). See explanation in H.R. Rep. No. 2070, 86th Cong., 2d Sess. 11-12 (1960). This provision was written by the Committee with particular care.

This bill—with the same provisions in its predecessor drafts (see, *e.g.*, H.R. 12731, as reported by H.R. Rep. No. 2070, 86th Cong., 2d Sess., §§ 2(3), 6)—reflects the most mature thinking of the legislators and the bar and the agencies on this important subject. To suggest that the prohibition of ex parte communications was intended, in the case of the CAB in 1957, to apply at an earlier time—or, more precisely, that American and the City of San Francisco were unwarranted in their view of the requirements at that time—is farfetched.

The CAB, it is true, has interpreted its requirements, in the course of this proceeding, as barring informal communications from the time an application is filed. But it has recognized that the interpretation of American and the

City was reasonable and in good faith. Most certainly it was, since, if H.R. 14 is adopted, the CAB will probably have to change its interpretation or the terms of its requirements so as to bring them into line with the provisions of that legislation, which are the same as was the interpretation of American and the City of San Francisco. Indeed, in its opinion the CAB admitted that the pending legislation reflects "markedly different views" from its interpretation. (Op. on Remand, p. 27, Tr. 10301).

One of the leading students of administrative law also has very different views, as his comments on this case disclose. See Gellhorn, *Administrative Procedure Reform: Hardy Perennial,* 48 A.B.A.J. 243, 244 (1962). And Dean Landis, in his landmark report to the President on administrative agencies in December 1960, in the course of which he had adverted to this very case, stated flatly that "*only at the hearing stage*" are ex parte communications harmful. Landis, *Report on Regulatory Agencies to the President-Elect* 43 (1960), cited in Op. on Remand, p. 27, n. 67, Tr. 10301. (Emphasis added).

Furthermore, neither the CAB nor either of the petitioners has yet undertaken to explain how there could be anything wrong with the resolutions and other communications sent to the CAB during 1957 in the light of the unqualified statutory right to anyone to file "a memorandum in support of" any application for a route certificate or certificate amendment, *for which the CAB had prescribed no regulations or procedures.* (Op. on Remand, App., pp. 105-11, Tr. 10420-26).

The Examiner, after a thorough examination of that statutory right, held flatly that it "contemplates a right to file protests or supports at any time, including the time prior to the setting of the case for hearing," and that no CAB regulation limited that right or prescribed how it should be exercised. (*Ibid.*, especially pp. 110-11, Tr. 10425-26). The CAB adopted the Examiner's discussion and conclusion. It defies common sense to suggest that the City of San Francisco or American was culpable for having solicited groups in the community and Congressmen to exercise their statutory right. The only way to exercise that right was to write a letter or send a resolution to the CAB that would go into the public correspondence file. That is exactly what persons and groups in the community and Congressmen did in this case—just as they have "in every major new route proceeding" as the Examiner said—and that is all they did. In this there was no wrong; they were doing nothing more than Congress gave them the right to do and there is not even a hint in the evidence that either the City or American asked them to do more.

The extremely artificial and technical character of the CAB's view that its formal requirements were applicable to the pre-January 1958 communications is well illuminated by its treatment of the December 1957 conference with the CAB of two representatives of the City. (See *supra*, pp. 11-12). In its opinion on remand the CAB holds that since the conference was confined to the City's general air transportation problems it was unobjectionable, but that the original intention of the City in seeking the conference, and of American in having suggested it, was wrong because the purpose had been to discuss the nonstop matter. (Op. on Remand, p. 16, Tr. 10290).

The distinction drawn by the CAB is quite unrealistic. It recognizes that it had always held conferences with cities to discuss their air transportation problems. As we have noted, it occurred to American to suggest that the City have this conference *because the City of Orlando and the City of Houston each was scheduled to have such a conference with the CAB in November 1957. The primary purpose and thrust of these conferences, as disclosed by the transcripts thereof, was to urge the need for activating a Southern Transcontinental Route Case involving numerous* *pending carrier route applications.*[10] *Indeed, when the Houston conference was held, there was actually pending a petition by Houston to activate such a case.*

Neither the City nor American had any idea that the conference would be secret, nor was it. The intention to seek it had been abundantly publicized, and the CAB's regular procedure, as everyone knew, was to have a transcript of the conference made and to make it publicly available.

Further demonstrating the artificiality of the CAB's view is the conference it held with the presidents of United and of Capital Airlines on the proposed merger of their carriers. A merger can be approved only after notice and hearing on a record. Yet the presidents of United and of Capital met with the CAB to discuss their merger proposal (not their "over-all transportation needs"), and United's president even discussed the *merits*. (Op. on Remand, App., p. 55, n. 43, Tr. 10370). A transcript was made and was made available to interested parties thereafter.

That conference was held—this is worth strongest emphasis—*after* this case had been remanded and *after* the CAB had announced, in its original opinion on reconsideration in this case in November 1959, that its formal procedures applied to communications to the CAB before a case had been set for hearing.

Yet United—which now professes to find something wrong in the City's conference of December 1957 in this case (United Br., p. 7)—betrays no consciousness of wrong in its president's having, "ex parte," argued the merits of its merger case "privately" in July 1960.

Nor indeed did this Court find anything wrong in it when, upon challenge, it affirmed the CAB order allowing the merger. *Northwest Airlines* v. *CAB,* U.S. App. D.C. , F. 2d (Nos. 16355, *et al.,* decided Jan. 25, 1962). One of the opponents of the merger in this Court, Northwest Airlines, specifically urged to this Court that such an ex parte conference violated the standards of judicial procedure, that making a transcript public did not cure the wrong, and that the ex parte presentation dealt not only with procedural matters but "also clear matters of substance," which it summarized. See Reply Brief for Petitioner, No. 16355, pp. 9-10; Brief for Petitioner, No. 16355, pp. 4-5, 18, 46. The CAB, in its brief to this Court, insisted that this argument was "specious." See Brief for Respondent, Nos. 16355, 16356, 16396, p. 35, n. 32. Needless to say, Northwest's argument did not appeal to this Court.

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[10] The transcripts of these conferences are available to the public in the CAB's files.

Our point is this:

> (a) The CAB's ex post facto interpretation of its procedures as they existed in 1957 is incorrect.
>
> (b) Even if that interpretation is permissible, the view of these procedures taken by the City and by American was reasonable and in good faith (with this the CAB fully agrees) and reflects adversely in no degree on either the City or on American.
>
> (c) With nothing secret or furtive in the parties' conduct, with a full and open evidentiary hearing held thereafter, and with the CAB's having recognized meticulously from the very outset that its decision on the merits would have to be based solely on that hearing record and argument thereon, there was violation neither of due process nor of propriety.

We note, finally, that it would be most unfair and inappropriate to upset the nonstop award to American on the basis of the CAB's ex post facto interpretation. The very experience of the CAB in endeavoring to make changes in its rules to effectuate that interpretation shows that the matter is too complex to be dealt with by merely interpreting the pre-existing Principles of Practice so as to apply them to the pre-case stage of a proceeding. Only by prospective rule making can those complexities be dealt with properly.

When the CAB first announced its interpretation in denying the petitions for reconsideration in the *Nonstop Case* it recognized that it should invoke rule making to effectuate the procedures its interpretation required. It proposed rule changes. This led to extensive comments from interested parties with "a marked divergence of views as to the proper scope of any ban on ex parte communications in Board procedures." (Op. on Remand, App., p. 120, Tr. 10435). Then the Examiner included in his Initial Decision a considerable exploration of the pending proposals and pointed out what he deemed to be deficiencies and unsolved problems. (Op. on Remand, App., *e.g.*, pp. 111, 119-20, 129-30, Tr. 10426, 10434-35, 10444-45). The CAB devoted a lengthy footnote to the Examiner's comments. (Op. on Remand, p. 4, n. 8, Tr. 10278). In the meantime it adopted changed rules, revising its original proposals. And it proposed some further changes. And it has still others under consideration. For example, it still has been unable to solve the problem of service on or formal notice to persons who might have an "interest" in an application but who have not become parties to the proceeding by intervening during the pre-case period when the application is dormant. (*Ibid.*).

In short, the CAB's ex post facto interpretation of its Principles of Practice as they were previously worded opened up a series of problems and questions that required "wholesale revisions," as the Examiner put it, both in the wording and in the substance of the prior rules, and the end is not yet.

Surely it would be going too far to accede to the petitioners' plea and to penalize the City of San Francisco and American because they had not foreseen that rules would be so interpreted as to make it mandatory that such extensive changes be made in them in order satisfactorily and fairly to effectuate that interpretation. If the CAB really did intend that its originally worded rules were to mean what the CAB, in this proceeding, has said they meant, that intention was most imperfectly manifested. The only proper way in a government of law to make that intent clear is by *prospective* interpretation or change in wording—not by an interpretation having grievous ex post facto consequences. In substance, the CAB has recommended such *prospective* action in its report to this Court. (Op. on Remand, p. 32, Tr. 10306). It is a recommendation founded on the CAB's intimate familiarity with these matters, and this Court should permit it to follow the course it proposes.

III. AMERICAN'S PRESS RELATIONS PROGRAM WAS NOT CULPABLE

The CAB found American's press relations program objectionable, under its Principles of Practice, although not so substantially as to require any reconsideration of its decision in the *Nonstop Case*.

It will be observed that the CAB construes Rule 2(c) of its Principles of Practice to bar activities "designed to educe favorable action on the motion to expedite by means other than formal participation before the Board." (Op. on Remand, p. 15, Tr. 10289). In other words, communications by a party on the question of setting the case, otherwise than in accordance with the formal procedures, would violate Rule 2(a); and activities designed to secure communications by non-parties other than in accordance with the formal procedures violated Rule 2(c).

American did fully publicize its May 1957 motion and sought favorable notice in the press. This was done for a variety of reasons. In the first place, American was a very minor factor in San Francisco's air transportation at that time and was little known in the area (Tr. 7694-95); it was deep in the shadow cast by United. (Tr. 7385). In the second place its proposal had "civic improvement and civic virtue and public progress and advancement written all over it" and was "a heaven sent opportunity" for securing favorable publicity for American in the community. (Tr. 6818). In the third place the newspapers had been aggressively interested in the question for years and were insistently demanding information. (Tr. 6822). In the fourth place, of course, American wanted to contribute to the effort to muster general civic support for the position being taken by the City.

Since American hoped that groups such as chambers of commerce would communicate to the CAB their support of the City's request for a hearing, and since it did not tell them that they could communicate their support only through the CAB's formal procedures (believing that that was not required prior to the instituting of the case), the CAB's argument appears to be that one of American's purposes in seeking publicity was to secure what the CAB now calls ex parte communications—in the sense that that would be one of the natural consequences of the publicity.

But the CAB's position turns, ultimately, on its view that the pre-January 1958 communications should have been confined to the formal procedures.

Thus we are returned to the essential question that we have discussed in our preceding point.

After the case was instituted by the CAB's January 1958 order, the record discloses absolutely nothing in relation to press activities except for the two episodes we referred to in stating the case, *supra*, pp. 16-18—for one of which American had no responsibility whatever, and with the other of which American had not the slightest connection—and the four press "handouts" we also referred to in our Statement, *supra*, p. 16. (Op. on Remand, p. 26, n. 65, Tr. 10300).

Apparently it is the CAB's view that, technically, these "handouts" were not permissible under the wording of Rule 2(c) of the Principles of Practice. But these "handouts"—two press releases and two memoranda to editors—were no more "pressuring" than would have been the handing out to newsmen of the exhibits and briefs that they summarized. The only difference is that they were in more convenient form than the original documents. (Tr. 6963-65). In principle they were no more objectionable than press materials that are handed out in connection with many kinds of litigation, even court litigation and even by the Department of Justice itself. (Op. on Remand, App., pp. 40-41, Tr. 10355-56).

The reason for these "handouts"—the evidence is clear on the point—is that the local public relations man for American in San Francisco was constantly badgered by inquiries from newsmen about the case. He issued these "handouts" on his own responsibility (Tr. 6816-17) in order to provide an easy means for meeting the inquiries with which he was constantly faced and save his time (Tr. 6822).[11]

In all this there is no support for the petitioners' insinuations that American was subjecting the CAB to blasting newspaper criticism. American did nothing of the sort—and, in fact, the amount of criticism of the CAB because of its alleged delays that did appear in the San Francisco press (for which neither American nor the City was in any way responsible) has been grossly exaggerated by the petitioners. (*Supra*, pp. 21-22).

We submit that were there to be adverse action against American because of its press relations as disclosed by this record, both before and after the activation of the *Nonstop Case* in January 1958, there would be presented the most serious question under the First Amendment to the Constitution.[12]

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[11] There is no suggestion that the "handouts" were issued by American's lawyers or with their knowledge. (*Cf.* Op. on Remand, App., pp. 68-69, Tr. 10383-84).

The CAB may well have been led into error in its discussion of impermissible press relations by its Examiner's confusion between the canons of conduct applicable to an attorney and the standards applicable to a layman. (Op. on Remand, App., pp. 143-44, Tr. 10458-59). And the CAB recognized the difficulty of concluding as it did and confessed that "our conclusion is one on which there can be reasonable differences of judgment on this record, particularly in view of the uncertainty surrounding the subject." (Op. on Remand, p. 26, Tr. 10300). Furthermore, the CAB makes it clear that the questioned press activities after the case was set for hearing were most minor. (*Id.*, p. 26, n. 65, Tr. 10300). And, as we have seen, the CAB recognizes that the reading given by both the City and American to its Principles insofar as the period prior to the setting of the case for hearing was concerned was both reasonable and in good faith. (*Id.*, p. 27, Tr. 10301).

In any case, therefore, the CAB's conclusion that no adverse consequences should be visited on American is proper. Hence it is unnecessary to pass on the grave Constitutional question that otherwise would be presented.

IV. APART FROM ITS PRESS RELATIONS AMERICAN'S ACTIVITIES AFTER THE CASE WAS ACTIVATED WERE NOT CULPABLE

The only impropriety found in American's conduct after the case was activated, apart from the press activities we have just discussed, was recognized by the CAB to have been quite minor. (Op. on Remand, p. 25, Tr. 10299). There were just two incidents. These two incidents were "at least three contacts with travel agents, which do not appear to have been clearly restricted to the then wholly proper action of soliciting support for Congressional appearances at oral argument," and "at least one Congressional contact which was evidently not limited to solicitation for oral argument." (Op. on Remand, p. 14, Tr. 10288; see also *id.*, p. 25, Tr. 10299).

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[12] Bridges v. California, 314 U.S. 252 (1941); Smotherman v. United States, 186 F.2d 676 (10th Cir. 1950). See also Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946). For a more extended discussion, see Brief of American Airlines, Inc., to the Civil Aeronautics Board, April 18, 1961, on the remand in this case, pp. 24-32. (Tr. 9973-81).

In making this finding the opinion, by footnotes, cites the evidence upon which it is based. (*Id.*, p. 14, nn. 28, 29, Tr. 10288).

Examination of this evidence shows why the CAB expressed its finding somewhat uncertainly. In the case of the travel agents' contacts, when American was seeking to encourage Congressional appearances at oral argument, the wrong, if any, occurred in American's lowest echelons and certainly was innocent as well as harmless. (*Supra*, pp. 19-20). As to the single Congressional contact referred to by the CAB, the finding is based upon an affidavit by a Trans World employee that he was told in one Congressional office that an unidentified American employee had drafted a letter that the Congressman was to send to the CAB. (Tr. 9219). This was one of the letters sent in lieu of oral argument. (J.A. 170-71). The CAB does not specify what was wrong—but the matter is so minor that it is quite unsubstantial, as well as exceedingly vague, and the cited evidence does not sustain the finding made.

Apart from the foregoing, the only specific charge made by either of the petitioners is Trans World's contention that American was culpable for having asked customers to encourage their Congressmen to appear at oral argument. (*Supra*, pp. 18-19). Trans World charges that this was an effort of American "to deliberately mislead Congressmen by creating a false impression of wide-spread public support . . . ." (Trans World Br., p. 21). Trans World's charge is made up out of whole cloth. In the first place American's solicitation was neither high pressure nor extensive; in the second place it sought nothing except an expression to the Congressman of interest where there was interest; and in the third place there was nothing in the least deceitful. Trans World cites no evidence to the contrary. And not only the CAB in this case but also the Court of Appeals for the Second Circuit in *Eastern Air Lines* v. *CAB,* 271 F. 2d 752 (2d Cir. 1959), firmly rejected an argument that carrier solicitation of Congressmen to appear at oral argument is wrong. The complaint rejected by the court in the *Eastern Air Lines* case included *indirect* as well as direct carrier solicitation. See Brief of Capitol Airways, Inc., p. 22, in that case.[12]

V. WERE THE COURT TO DISAPPROVE THE CAB'S DISPOSITION OF THIS CASE IT SHOULD NOT DIRECT THAT THE NONSTOP SERVICE OF AMERICAN BE DISCONTINUED

United submits a short affidavit with the suggestion that, if the award to American is rescinded, its service should be terminated at once because for the year ending in January 1962 United and Trans World had a large number of empty nonstop seats between San Francisco and New York, and, it is said, would fully meet the future needs of the public in their own nonstop services.

This Court should not be injected into any such question. United is playing a tired tune—one that it has played with many variants for years. The evidence in the *Nonstop Case* and the CAB's original opinions in that case show that this old tune is hardly enough to satisfy the public's need.

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[12] The CAB has recently adopted a rule limiting appearances at oral argument to regular representatives of the parties. When the CAB Chairman explained this to the House Committee on Interstate and Foreign Commerce at its hearings on H.R. 14, it evoked a storm of protest from members of the Committee that ran throughout the remainder of their hearings. It is evident that important members of Congress sincerely believe that a prohibition of the time honored practice of their appearing at oral argument is an infringement of the Constitutional rights of the Congress. Hearings on H.R. 14 before the House Committee on Interstate and Foreign Commerce, 87th Cong., 1st Sess. 33-38, 40-43, 71, 88, 92-97, 99-101, 132 (1961).

Trans World, United's historically compliant competitor in the San Francisco service, and United itself had a long history of rationing the San Francisco traveling public with niggardly and grudging service until American's proposed service became a real threat to their complacency. (See, *e.g.*, J.A. 796-99). This Court should not, on the basis of a two-page summary affidavit with fragmentary statistics, attempt to decide how the public needs are to be met. If there are to be still further proceedings in this matter the question of continuing the existing service should be left for determination by the CAB.

CONCLUSION

The CAB and its staff had an enormous burden on the remand because of the shot-gun nature of the charges made by the petitioners. The diligence and thoroughness with which they conducted the proceeding on remand are demonstrated by the meticulousness with which the record was made up, including even the most innocuous and perfunctory of Congressmen's letters to constituents. (*Supra*, p. 21, n. 6). And the scrutiny of that record was critical to a fault. Illustrative is the CAB's conclusion that a brief telegram to the CAB from the Mayor of San Francisco in June 1958 (which went into the public correspondence file) urging that the hearings not be delayed as had been ordered was not purely procedural, as the Examiner had found, but touched on the merits, presumably because the telegram included a sentence saying that the City should receive jet service by the end of 1958. (*Supra*, p. 15, n. 4).

Despite this extraordinary thoroughness and critical examination, there is not the remotest suggestion of any clandestine, back-door approach or attempted approach. Indeed it seems that the principal complaint of the petitioners is that the conduct of the City and of American was *too public*.

We urge that the CAB has displayed keenest alertness to the need to protect the integrity of its processes, so keen, indeed, that it adopted an interpretation of its rules far more strict in its required formality of procedure than had ever been thought appropriate and, in the light of the pertinent statutory provisions and two decades of experience, at best barely defensible. Its very alertness should be an assurance to the Court that its proposed ultimate disposition of this case is the reasonable and just one.

Respectfully submitted,

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May 1962

APPENDIX

Section 401 of the Federal Aviation Act, 72 Stat. 754, 49 U.S.C. § 1371, provides in pertinent part:

> "(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.
>
> "(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.
>
> "(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.
>
> * * *
>
> "(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, . . . Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate."

Rule 2 of the Civil Aeronautics Board's Principles of Practice, 14 C.F.R. § 300.2, in pertinent part provided at the time the *Nonstop Case* was heard:

> "*Hearing Cases—Improper Influence.* It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases—

> "(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.
>
> * * *
>
> "(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case."

Rule 8 of the Civil Aeronautics Board's Rules of Practice, 14 C.F.R. § 302.8, in pertinent part provided at the time the *Nonstop Case* was heard:

> "*Service of documents*—(a) *Who makes service*—
>
> * * *
>
> "(2) *The parties.* Answers, petitions, motions, briefs, exceptions, notices, or any other documents filed by any party or other person with the Board or an examiner shall be served by the person filing such document upon all parties to the proceeding in which it is filed, and proof of service shall accompany the document when it is tendered for filing."

Rule 15 of the Civil Aeronautics Board's Rules of Practice in pertinent part provided at the time the *Nonstop Case* was heard:

> "....
>
> "(c) *Petition to intervene*—(1) *Contents.* Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he thinks he should be permitted to intervene....
>
> "(2) *Time for filing.* Unless otherwise ordered by the Board, any petition for leave to intervene shall be filed within the following time limits:
>
> * * *

(ii) In all other proceedings, including mail rate proceedings where no show cause order is issued, the petition shall be filed with the Board prior to the first prehearing conference, or, in the event that no such conference is to be held, not later than fifteen (15) days prior to the hearing.

* * *

"(d) *Effect of granting intervention.* A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order."

WILBUR K. MILLER

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BRIEF FOR INTERVENOR
AMERICAN AIRLINES, INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15,414, 15,415

UNITED AIR LINES, INC.,
TRANS WORLD AIRLINES, INC., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*,
AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO, *Intervenors*.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

United States Court of Appeals
For the
District of Columbia Circuit

FILED FEB 15 1960

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February 15, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the receipt by the Civil Aeronautics Board of written communications from Congressmen, state and civic officials and members of the public denied petitioners a fair hearing, or due process of law, when such communications were placed in the Board's public correspondence file for the case below and either:

(a) Were sent to the Board prior to the activation of the case urging only that a hearing be held; or

(b) Were sent after the start of the case and related only to procedural matters; or

(c) Were sent after the start of the case by Congressmen transmitting without comment on the merits letters received from constituents; or

(d) Were sent by Congressmen and a state official at or near the time of oral argument in lieu of the oral argument permitted the senders by the Board's Rules of Practice.

2. Whether petitioners were denied a fair hearing, or due process of law, by a conference held by the Civil Aeronautics Board with representatives of the City of San Francisco to discuss the City's aviation problems at a time when the case below had not been activated by the Board and where the Board promptly made a full transcript of the conference available to the petitioners.

3. Whether the communications in the public correspondence file or the Board's conference with San Francisco violated the Board's rules in such a way as to prejudice petitioners.

4. Whether the Civil Aeronautics Board was required to await actual operating experience with jet aircraft before deciding the case below or was required to reopen the record to receive additional evidence on the cost of jet service.

5. Whether there was error in the refusal to compel production of a study prepared by members of the Board's staff prior to the activation of the case below when there was no showing that the study contained, or might have contained, facts essential to the preparation of petitioners' cases.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15414, 15415

UNITED AIR LINES, INC.,
TRANS WORLD AIRLINES, INC., *Petitioners,*
v.
CIVIL AERONAUTICS BOARD, *Respondent,*
AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO, *Intervenors.*

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR INTERVENOR AMERICAN AIRLINES, INC.

COUNTERSTATEMENT OF THE CASE

This case is a review of the respondent Board's decision in the *New York-San Francisco Nonstop Service Case,* C.A.B. Docket No. 9214, in which the Board amended a certificate of convenience and necessity of the intervenor, American Airlines, Inc., so as to authorize it to operate nonstop airline service between New York/Newark and San Francisco/Oakland. Theretofore American's authority had required that, in its service between those terminals, it make an intermediate stop at Chicago or certain other cities in Oklahoma, Texas, or Arizona.

Our argument will be addressed, in the main, to issues posed by the petitioners respecting so-called ex parte communications to the Board outside the record on which decision of the case was based and not served on the parties to the case. To minimize repetition, we will largely confine our counterstatement of the case to matters relevant to those issues, touching only briefly on other features. No doubt the brief on behalf of the Board will provide a fuller statement on other issues.

The so-called ex parte communications are to be found in (a) the Board's public correspondence file maintained in connection with the proceeding here in question,[1] and (b) a transcript of a short conference on December 2, 1957, between the Board and representatives of the City of San Francisco, an intervenor here (Tr. 5466-82).[2]

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[1] There are 418 pages of communications in the Board's public correspondence file for this case (Tr. 165-582). Petitioners' charges of improper ex parte representations rest on 285 pages of these communications, copies of which were attached as an appendix to Trans World's petition to the Board for reconsideration of its decision in which petition the ex parte matter was first raised (Tr. 4793-5103). Copies of this appendix were handed to this Court by counsel for Trans World during the October 29, 1959, oral argument on the petitions for stay. (The remaining 130 odd pages of communications in the file are, for the most part, duplicates of the pages excerpted by Trans World and letters sent to the Examiner and the Board by the parties transmitting exhibits, rebuttal exhibits, briefs, etc.) Our subsequent discussion and analysis of the public correspondence file maintained by the Board in the proceeding below will be restricted to the 285 pages of the file of which petitioners make complaint. These pages appear in the record as Tr. 165-76, 191-92, 198-200, 204-05, 207, 209-15, 236-43, 245-48, 250-52, 255-61, 266-71, 279-86, 290-92, 294-310, 313-14, 319-31, 356-59, 361-65, 367-72, 374-76, 378-81, 383-98, 400-17, 420-21, 423-29, 431-32, 434-51, 455-56, 458-77, 479-83, 489-524, 528-31, 533-35, 543-49, 552-76.

Practically all of the communications of any real significance to the petitioners' argument occurred during a period preceding the order of the Board of January 13, 1958, which instituted the proceeding here under review. An understanding of the case will be aided, therefore, by a brief explanation of the way in which the Board institutes a proceeding of this nature. Also helpful will be an explanation of the Board's public correspondence files which are maintained in all its cases.

The Activation of a Route Case

Section 401(a) of the Federal Aviation Act provides that an air carrier can engage in air transportation only pursuant to a "certificate issued by the Board."[3]

Section 401(b) provides that an application for such a certificate shall be in such form and shall be served on such interested persons as the Board's regulations require. The Board has adopted no regulations requiring such service.

Section 401(c) provides that, upon filing, the Board is to post a notice of an application in its offices. It also provides for notice by the Board "to such other persons" as the Board's regulations require. The Board has adopted no regulations requiring such notice. See *infra*, n. 5.

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[2] The transcript was not a part of the proceeding and the Board has not certified it to the Court as part of the record. Trans World has stated it intends to reprint the transcript as part of the Appendix employing the above-cited pagination.

[3] The pertinent provisions of Section 401 of the Act are set forth in Appendix A hereto.

Section 401(c) then permits interested persons to file "a protest or memorandum of opposition to or in support of the issuance of a certificate." This provision makes no reference to Board regulations and the Board has adopted no regulations pursuant thereto.[4]

Section 401(c) also provides that the application "shall be set for public hearing" which is to be disposed of "as speedily as possible."

As to *amendments* to certificates, Section 401(g) provides that, on petition, complaint, or its own initiative, the Board, after notice and hearings, may amend a certificate. The Board has adopted no regulations as to service or even as to notice of applications for such amendments.[5]

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[4] Rule 14 of the Board's Rules of Practice does not regulate this statutory right. The text of this Rule is set forth in the Appendix of United's brief at p. A-4 and in the Appendix of Trans World's brief at pp. 39-40.

This Rule gives to any person not a party the privilege of appearing at any hearing (other than in an enforcement proceeding) and presenting relevant evidence, and of presenting a written statement "on the issues involved in the proceeding" to the Examiner or the Board, which statement is to conform to the requirements as to "form, content, service, and time of filing" applicable to briefs of parties. (A further sentence in this Rule, discussed in another connection, *infra* pp. 40-42, is limited to public persons and permits them to participate in oral argument.)

The foregoing provision as to written statements could not be construed to govern the "protest or memorandum of opposition to or in support of the issuance of a certificate" provided for in the statute. The statutory provision is a special one dealing with certificate applications—not a general provision for all proceedings as is Rule 14—and, especially when read in context, obviously contemplates a right to file protests or supports at any time, particularly including the time prior to the setting of the case for hearing—not, as in the case of the statement contemplated by Rule 14, a formal brief based on a record made up at the evidentiary hearing.

In this section, however, as in Section 401(c), there is a provision permitting interested persons to file "a protest or memorandum in support of or in opposition to" a certificate amendment. The Board has adopted no regulations pursuant to this provision.[6]

Since there is a practical limit to the number of cases which the Board can hear, but no limit to the number of applications a carrier can file, there is always a backlog of hundreds of certificate applications and certificate amendment applications for which no hearing has been set.

Upon filing, an application receives an individual docket number. Though the Board theoretically makes some effort to set applications for hearing in a sequence determined by date of filing, in practice, as the Board has pointed out, the "priority-of-filing policy seldom has a chance to operate," and most applications are set for hearing according to considerations having nothing to do with the date of filing. C.A.B. Order No. E-14412, September 2, 1959, pp. 19-20, n. 24a (Tr. 4750-51).

There is no established procedure for determining what application should be set for hearing at a particular time. The Board's staff studies the needs of communities and of areas, formally or informally, and discusses the matter with the Board. Carriers discuss the problem with the Board and the staff. Cities communicate with the Board on the subject by letter or orally. Not infrequently the Board holds a conference with civic representatives concerning their needs and thereafter makes available a transcript of such conference to any interested carrier. Sometimes a city or a carrier will seek to focus attention on a problem by filing a motion with the Board requesting that a particular proposal be set for hearing. State officials and Congressmen often are very active in urging action by the Board, both in oral and in written communications. Members of the public often write to the Board concerning their interest in new services.

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[5] The Board does publish weekly summaries of applications for certificates and for certificate amendments which it has received during the prior week. These summaries are available to all interested persons. The Board, of course, does not thereby purport to give notice of the filing of an application to any particular person.

[6] See *supra*, n. 4.

When the Board determines to give attention to a particular application or group of applications, or to the needs of a particular city or area without regard to particular applications, often a notice of prehearing conference is issued specifying the matter to be considered. At other times the Board will issue a formal order setting a case for hearing with a tentative statement as to the geographical boundaries of the case and the services to be considered. This is also followed by a prehearing conference.

In both cases, carriers desiring to have applications included in the proceeding which have not been covered in the notice are supposed to file such applications, with motions to consolidate, or, if they already have applications on file, to file motions to consolidate, at or before the conference.[7]

The prehearing conference is conducted by a hearing examiner. He canvasses the positions of the parties as to the desired scope of the proceeding, taking the Board's notice of the conference, or its initial order, as a point of departure or a point of focus.[8] The matter is then referred by the examiner to the Board which studies the question further and finally issues a consolidation order specifying what applications are to be heard, what interventions are permitted, and what the scope of the case will be. After the consolidation order is issued, there occur the regular procedural steps in the case: advance exchange of exhibits, advance exchange of rebuttal exhibits, advance exchange of written testimony, evidentiary hearing, and so on.

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[7] Rule 12 of Civil Aeronautics Board Rules of Practice in Economic Proceedings, 14 C.F.R. § 302.12.

The important thing to observe is that certainly until the notice of prehearing conference, or the order initiating the case, an application for a certificate or for an amendment of a certificate is at most an inchoate item. In fact, many and probably most applications are never heard by the Board in the form in which they are filed. As proceedings are activated, portions of applications will be "severed out" and given a new docket number by the Board in order to comport with some proceeding fashioned by the Board which does not fit the original application. Nor, when the application is filed, can anyone tell, even approximately, who the parties will be in any proceeding in which the application or some part of it is ultimately heard; or what the issues will be in such a proceeding; or when a proceeding will be conducted.

In no real sense, therefore, does the mere filing of an application begin a proceeding. C.A.B. Order No. E-14664, p. 8, n. 14, para. 2 (Tr. 5442). It merely indicates that the applicant *maybe* will *some time* be seeking the service or some part of the service embraced in the application.

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[8] Rule 23, 14 C.F.R. § 302.23.

The Board's Public Correspondence Files

The Board receives a mass of communications from members of the public, from state and civic officials, from Congressmen, and from others, concerning all sorts of pending matters. The communications come in a steady stream. When they refer, as they often do, to a particular route application or some other docketed matter, or when they appear to, they are placed—together with the Board's letters of acknowledgment—in a file relating to that docket called "the public correspondence file."[9]

This has been the Board's practice since its very earliest days and is a thoroughly familiar one (Tr. 5439).

These files are maintained in the Board's Docket Section. They are available at all times for public inspection (*Ibid.*). Petitioners of course knew of this practice of the Board (Tr. 5356, 5439).

This file does not contain any of the regular pleadings or evidentiary matter or the briefs in a case, and it is not treated by the Board as a part of the record on which the decision is based (Tr. 5454). Indeed, the communications in the file are handled by the Board's staff which prepares routine acknowledgments thereof and, where appropriate, informative responses on the procedural status of the pending matter. Frequently these acknowledgments are signed by a Board member (Tr. 5454).

Even after a proceeding is activated, the Board receives communications relating to a particular case and these also are placed in the public correspondence file for the case. Congressmen are especially prone to write the Board requesting information as to the status of the case. Sometimes a letter is sent by a constituent to a Congressman who then sends it to the Board with a letter of transmittal or a printed transmittal slip. Occasionally, the constituent will ask the Congressman for information concerning the proceeding, and the Congressman in turn will ask the Board for advice as to what to tell his constituent.

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[9] Occasionally a filing clerk's mistake will insert such a document in the record file in the Docket. But such a mistake is recognized as inadvertent. *Infra*, p. 44, n. 27.

Finally, though Congressmen and state officials are permitted under Rule 14 of the Board's Rules of Practice[10] to appear at oral argument, quite frequently they send the Board written statements or letters in lieu of oral argument. These also are placed in the public correspondence file for the case.

The Procedural History of this Case

1953—May, 1957. On January 12, 1953, American filed an application to amend its certificate for its transcontinental Route 4 by eliminating therefrom a limitation which permitted it to serve San Francisco/Oakland only on flights which made stops at Tulsa, Dallas, or points west thereof (Tr. 1-4). Among other things, this prevented nonstop service between New York and San Francisco and imposed a considerable degree of circuity on American's one-stop operations.

The application, assigned Docket No. 5903, remained dormant until 1958.

However, in 1953 the Board activated the *Denver Service Case,* Docket No. 1841, *et al.,* involving transcontinental service via Denver, and in that case the Board included another application of American which sought authority, among other things, to fly nonstop to San Francisco from Chicago and other points east of Chicago. Many other proposals of many other carriers were also included in that case.

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[10] 14 C.F.R. § 302.14. See *infra,* pp. 40-42.

The *Denver* case was decided in 1955. American was authorized to fly nonstop between Chicago and San Francisco. Both of the petitioners say in their briefs that in this decision "the Board denied American authority to duplicate the nonstop authorizations of TWA and United . . . between San Francisco and New York . . . ." (TWA Brief, p. 2; see also United Brief, p. 2.) This is somewhat misleading. Actually the Board denied American the right of nonstop to San Francisco from any point east of Chicago—Detroit, Washington, Hartford, Philadelphia, Boston, New York, and so on—for all of which authority American had applied in the case. However, the decision, in authorizing American to operate nonstop from Chicago to San Francisco, did recognize that this would enable American to "continue its participation as the third transcontinental carrier between the Bay Area and New York. . . ." C.A.B. Order No. E-9735, November 14, 1955, p. 12. This would be true since this new authority would allow American to operate a direct through plane service from New York to San Francisco via Chicago whereas American's former authority had required a roundabout stop in the Southwest.

When the *Denver* case was decided, transcontinental nonstop service was in its infancy. Indeed it was only shortly before that decision that either of the petitioners had begun offering roundtrip nonstop service between New York and San Francisco, and then only on a limited basis.

But soon thereafter it became apparent that transcontinental nonstop service was extremely attractive to the traveling public. A one-stop service could not compete effectively.

In addition, when the *Denver* case was decided in 1955, planning for jet equipment was still in a very early stage, and no one realized how quickly jet transportation would materialize. Thereafter, technological development occurred swiftly and by early 1957 jets had become imminent. The speed and range of the jets would, of course, have a profound impact on transcontinental operations. Whatever minor place one-stop service would retain in the piston era, the jets certainly would draw to the nonstop all of the traffic.

Thus, despite the Board's contemplation, in the *Denver* case, that American would continue to participate as a third carrier in the New York-San Francisco market, events quickly posed the threat of American's complete extinction whenever Trans World and United chose to provide adequate nonstop service.

Moreover, with the impediment of the one-stop restriction on American's competition, its competitors permitted the quality of their New York-San Francisco service to suffer. Between November, 1955, when the *Denver* case was decided, and April, 1957, the number of New York-San Francisco nonstop seats provided by Trans World and United actually declined, despite rising traffic (Tr. 2485-87).

May, 1957—June, 1957. In these circumstances American on May 3, 1957, filed with the Board a motion requesting that there be severed out of its old 1953 application in Docket No. 5903 the issue of New York-San Francisco nonstop service and that an expedited hearing be held focusing on this single issue instead of ranging over a complex of issues and services as had occurred in the *Denver* case (Tr. 5-21).

At that time American was the only carrier having an application for such a service.

American's motion was supported by San Francisco, Oakland and the Port of New York Authority (Tr. 23, 40, 68). Petitioners opposed American's motion maintaining that their New York-San Francisco nonstop services were adequate (Tr. 44, 55-57, 71, 82-83). On June 26, 1957, the Board denied American's motion but directed its staff to prepare a study of the New York-San Francisco air service pattern by December 1, 1957. C.A.B. Order No. E-11493 (Tr. 129).

The public correspondence file reveals that between the time the motion was filed and the time it was denied, the Board received 52 communications from the Mayor of San Francisco, from numerous Congressmen, from state and city officials, chambers of commerce and other community organizations and from members of the public—all urging that a hearing be held on American's application.[11] Enclosed in the letters from the Mayor of San Francisco were 41 pages of resolutions of various outlying communities and clippings from local newspapers similarly urging the holding of hearings on this matter.

None of the above communications were served on petitioners or on American. They were simply placed, together with the Board's routine letters of acknowledgment, in the public correspondence file in Docket No. 5903, the docket containing American's application.

These communications and Board replies cover 161 pages—far more than half of the 285 pages of the Board's public correspondence file for this case on which petitioners' charges rest.[12]

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[11] As noted, our references, *infra*, to the public correspondence file are to those portions of the file on which petitioners base their charges. *Supra*, p. 2, n. 1.

[12] Tr. 165-71, 174-75, 356-59, 361-65, 367-72, 374-76, 378-81, 383-98, 400-17, 420-21, 423-29, 431-32, 434-51, 455-56, 458-77, 479-83, 489-524, 528-31.

June, 1957—January 1958. Dated between June 26, 1957, when American's motion was denied, and January 13, 1958, when the Board entered its order activating the proceeding here under review, are another 38 pages of the public correspondence file (Tr. 172-73, 176, 533-35, 543-49, 552-76).

Aside from Board acknowledgments to these or earlier communications, these pages indicate 17 communications to the Board. Thirteen were from Congressmen either urging that a hearing be held or merely transmitting letters from constituents without comment or with a request for advice from the Board as to the status of the matter.[13] One was from the Mayor of San Francisco expressing concern over the Board's denial of American's motion.[14] Of the remaining three communications, two were from civic groups urging the holding of hearings (Tr. 547, 558) and the other was a transmittal slip from Mr. Sherman Adams of the White House staff forwarding, without comment, a letter from the Chairman of the San Francisco Mayor's Committee urging the need for a hearing (Tr. 560-64).

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[13] Tr. 176, 533-35, 545, 549, 553, 555, 557, 566, 568, 570, 572, 574, 576.

[14] The letter sent by the Mayor expressing concern over the denial of American's motion was sent to the Board on July 3, 1957, was not served on anyone and was placed in the public correspondence file (Tr. 172-73). On July 11 the Board Chairman wrote the Mayor stating that the letter of July 3 was in effect a petition for reconsideration of the order denying American's motion and should have been appropriately served (Tr. 536). The Mayor then refiled the letter indicating service upon the petitioners, American, Oakland and the Port of New York Authority. This letter was placed in the pleadings file (Tr. 132-33). On July 29, 1957, United answered the letter of July 3 (Tr. 134-35).

Again these communications were not served on petitioners or on American; they were put in the public correspondence file.

It will be noted that during this time no motion was pending before the Board. American's motion for a hearing had been denied. The Board had simply announced that it would make a study of New York-San Francisco service through its staff.

In the foregoing we have accounted for 199 pages of the 285 pages of the public correspondence file. All of this relates to the period prior to the institution of the *New York-San Francisco* case by the Board—to a time, in other words, when no one knew whether there would be a case or, if so, who the parties would be or what the case would involve.

Also during the period two San Francisco representatives had a conference with the Board, arranged by their Congressmen. The conference was held on December 2, 1957. A transcript was made to be available to anyone desiring it (Tr. 5468). The whole conference covers only 17 transcript pages. By January 29, 1958, both petitioners had presented petitions to the Board concerning this conference (Tr. 583, 598, 602, 611), so they had both examined the transcript very promptly. In fact the conference was publicized in the trade press and the transcript was well known to these petitioners (*cf.* Tr. 5457).

Shortly before the conference a newspaper reported a statement by a representative of San Francisco to the effect that the Board would have to be "pressured" and that the City was hiring a lobbyist to advance its interests. At the beginning of the conference the Board's chairman questioned the City's representative about this alleged statement. The city representative (the chairman of the Public Utilities Commission of the City and County of San Francisco) explained that:

> "... the word 'pressure' was undoubtedly a silly word to use. However, I meant to say, and I did say time and time again during this long procedure that what we were trying to do was to get the interest of San Francisco before the Board in the most effective and legitimate way which I believe is traditionally the representations of our Congressmen and Senators to the Board" (Tr. 5470).
>
> "If any error has been made, it is my error and I certainly hope the people of San Francisco and Northern California will not be penalized by my error. This hearing [a hearing before an agency of San Francisco where he made the statement] actually occurred some two or three weeks ago. There was a subsequent hearing before the Board of Advisors. I corrected this mistake, but I am willing to make any type statement the Chairman thinks in order to clarify what I said and to explain it, and if necessary to apologize to the Board" (Tr. 5470).

The remainder of the conference consisted of a generalized discussion of the City's desire to have attention given to its need for the additional transcontinental nonstop service with some mention of certain of its other service problems.

January, 1958—March, 1959. Of the remaining 86 pages of the public correspondence file, 30 pages are dated between January 13, 1958, and March 9, 1959, when the Examiner issued his initial decision.[15]

On January 13, 1958, the Board, two members dissenting, activated the *New York-San Francisco Non-*

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[15] Tr. 191-92, 198-200, 204-05, 207, 209-15, 236-43, 245-48, 250-52. One of the pages is an acknowledgment by the Board dated March 11, 1959, of a letter received prior to March 9 (Tr. 250).

stop Service Case by severing from American's application in Docket No. 5903 that portion relating to the New York-San Francisco nonstop issue, assigning it Docket No. 9214, and ordering an expedited hearing thereon.[16] C.A.B. Order No. E-12103 (Tr. 136-37).

On April 9, 1958, the Board denied the petitioners' requests for reconsideration of Order No. E-12103, the same two members again dissenting. C.A.B. Order No. E-12337 (Tr. 639-46).

The Board gave two main reasons for holding a hearing on the issue of New York-San Francisco nonstop service. (1) Within four months after the filing of American's May, 1957, motion the number of New York-San Francisco daily nonstop flights leaped from 8 to 14, an increase of 75%. The Board felt that this increase, following a long period during which the services had remained unchanged despite rising traffic, raised serious questions as to whether petitioners had been adequately serving the market (Tr. 640-41). (2) Keenly aware of its difficulties in keeping abreast of the impact of technological changes on air transportation, and of the technological revolution promised by the jet, the Board sought to prepare itself for the future by conducting in this case an investigation of "the imminent impact of the operation of jet aircraft" on such a market, and the parties were instructed to submit evidence on the "planned operation of jet aircraft in this market" (Tr. 136).

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[16] At that time, or soon thereafter, the public correspondence file in Docket No. 5903 was moved into the public correspondence file to be maintained in Docket No. 9214.

On May 15, 1958, the Board issued Order No. E-12511 consolidating into the case a very recently filed application of Northwest Airlines, Inc., for New York-San Francisco nonstop authority (Tr. 709-10).

Though the Board ordered the hearing expedited, almost 14 months passed between the order activating the case and the issuance of the Examiner's initial decision. Nearly two months were lost when, at the request of United (Tr. 716), the dates for the filing of exhibits were extended with the result that the hearing, which would have concluded in July, 1958, under the original schedule (Tr. 671), actually did not conclude until mid-September.

Of the 30 pages of the public correspondence file dated after January 13, 1958, and prior to the Examiner's initial decision in March, 1959, 14 pages were communications to the Board; the rest were letters of acknowledgment from the Board to these or earlier communications.[17] One of the pages was a telegram from the Mayor of San Francisco urging the Board to try to conclude the hearings in July (Tr. 199). *This was the only instance after the activation of the case of a communication from a party.*

The remainder of those 14 pages consist of 12 communications from Congressmen dealing with such matters as an invitation to hold hearings in San Francisco, expressing concern about delays in the hearing schedule, inquiring as to the status of the case, and asking to appear at the oral argument. One of these communications was a transmittal without comment of a letter from a travel agent requesting the Congressman to advise the agent as to his "feelings" about the case.

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[17] Tr. 191-92, 198-200, 204-05, 207, 209-15, 236-43, 245-48, 250-52.

These Congressional communications are summarized in the footnote.[18]

(It may be observed, incidentally, that insofar as delays in the hearing schedule were concerned, the views of the petitioners prevailed.)

March—May, 1959. In his initial decision, issued on March 9, 1959, the Examiner concluded that there was need for "immediate" authorization of New York-San Francisco nonstop service by American. The Examiner's findings were quite detailed and voluminous (Tr. 4083-4150).

Following the filing of exceptions to the initial decision, and briefs to the Board in support thereof, the Board held oral argument on April 29, 1959.

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[18] (1) Letter dated May 12, 1958, from Congressman Shelley inviting the Board to hold hearings in San Francisco (Tr. 192); (2-3) transmittal slips from Congressman Shelley dated June 24 (Tr. 200), and from Senator Knowland dated June 25 (Tr. 205), forwarding copies of the telegram to the Board from the Mayor of San Francisco referred to above in the text; (4) telegram dated June 27 from Senator Kuchel supporting the Mayor's telegram (Tr. 215); (5) letter dated June 27 from Congressman Maillard expressing concern over delays in the hearing schedule (Tr. 212); (6-7) letters dated February 3, 1959, from Senator Engle and Congressman Younger each enclosing a letter received from the Mayor of San Francisco and asking advice as to the status of the case (Tr. 239, 241); (8) letter dated February 9 from Congressman Cohelan stressing the importance to San Francisco of jet service and urging that the case be expedited (Tr. 243); (9) letter dated February 10 from Congressman Clem Miller urging that the case be expedited and requesting advice as to when a decision might be expected (Tr. 237); (10) letter dated February 16 from Congressman Johnson stating his interest in an early decision (Tr. 246); (11) letter dated February 24 from Congressman George Miller requesting that he be permitted to appear at the oral argument (Tr. 248); (12) letter dated March 3 from Senator Case transmitting without comment the letter from a travel agent referred to above in the text (Tr. 251-52).

All of the remaining 56 pages of communications in the public correspondence file bear dates from March 23, two weeks after the initial decision was issued, through April 29, the date of oral argument,[19] except for three communications immediately thereafter, one on April 30 (Tr. 324), one on May 5 (Tr. 313), and one on May 7 (Tr. 330). In these pages, there are 20 communications to the Board. The rest are letters of acknowledgment from the Board to these or earlier communications.

There are so many loose and generalized statements in the petitioners' briefs concerning the communications in the public correspondence file that the actual facts are obscured. For this reason we summarize every one of these 20 communications to the Board:

(1) Letter dated March 11 from Congressman Cohelan asking for permission to be heard at oral argument (Tr. 256).

(2-3) Transmittal slip and a letter of transmittal from Congressmen Addonizio (Tr. 261) and Derounian (Tr. 258-59), each dated March 23 and forwarding without comment a letter from a travel agent favoring American's application.

(4) Letter dated April 2 from Congressman Rooney transmitting without comment a letter from a travel agent favoring American's application (Tr. 267).

(5) Letter dated April 9 from the Office of the Governor of California to the City Attorney for San Francisco enclosing a written statement by the Governor in lieu of oral argument and asking the City

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[19] Tr. 255-61, 266-71, 279-86, 290-92, 294-310, 314, 319-23, 325-29, 331.

Attorney to forward the statement to the Board at the proper time (Tr. 269-71).

(6) Letter dated April 22 from Senator Kuchel enclosing a statement of his position on the merits and requesting that the statement be received under Rule 14 (Tr. 284-86). (This Rule is explained *infra,* pp. 40-42). The letter was received by the Board prior to oral argument and the Chairman specifically stated at the argument that the statement would be "included in the docket" (Tr. 4506). Counsel for petitioners did not object and did not even ask to see Senator Kuchel's statement.

(7) Letter dated April 22 from Congresswoman St. George stating her position on the merits (Tr. 295).

(8) Letter dated April 24 from Senator Engle submitting his "statement under Rule 14" (Tr. 280-82). Senator Engle's statement was referred to by the Chairman at oral argument when he referred to Senator Kuchel's. (See item 6 above.)

(9) Letter dated April 28 from the Chief Clerk of the California Assembly transmitting without comment Assembly Resolution No. 27 relating to New York-San Francisco nonstop service (Tr. 310). The Resolution itself was read at oral argument by Congressman Johnson (Tr. 4536-38).

(10-13) Letters and statements dated April 28 from Senators Javits and Keating (Tr. 308), and Congressmen Osmers (Tr. 299), Anfuso (Tr. 305-06) and Wainwright (Tr. 302-03) stating their positions on the merits and, in all cases but one, specifically requesting that the letters or statements be received under Rule 14.[20] The statements of Congressmen Osmers and

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[20] The letter from Senators Javits and Keating inadvertently referred to the Rule as "Rule XIII" (Tr. 308).

Anfuso were referred to by the Chairman at oral argument when he referred to Senator Kuchel's. (See item 6 above.)

(14-17) Letters and statements dated April 29 from Congressmen Moss (Tr. 291-92), O'Brien (Tr. 297), Sisk (Tr. 320-22) and Multer (Tr. 327-28) stating their views on the case and, in all cases but one, specifically requesting that the letter or statement be made a matter of public record. Congressman Moss' statement was referred to by the Chairman at oral argument when he referred to Senator Kuchel's. (See item 6 above.)

(18) Transmittal slip dated April 30 from Senator Keating forwarding without comment a letter dated April 25 from a constituent favoring American's application (Tr. 324-25).

(19) Transmittal slip dated May 5 from Mr. Goodpaster of the White House forwarding without comment Assembly Resolution No. 27 (see item 9 above) and a letter from Mr. Morgan of the White House to the Chief Clerk of the California Assembly acknowledging the receipt of the Resolution (Tr. 313-14).

(20) Letter dated May 7 from Senator Case transmitting without comment on the merits an undated telegram from a travel agent requesting that the Senator support American's application (Tr. 330-31).

Thus twelve communications were written statements submitted in lieu of oral argument, in accordance with long-standing practice. All of these twelve communications either expressly referred to the Board's Rule 14, pursuant to which the sender thought such statements are filed (see *infra*, pp. 40-42), or were obviously so intended. Five of the twelve were specifically referred to at oral argument by the Chairman who stated they would be placed in the docket. There was no objection to this by counsel for petitioners; nor did they even ask to look at the communications.

One communication was a request to appear at the argument.

Four were non-committal transmittals of travel agents' letters urging to the Congressmen the merit of American's application.

One was a non-committal transmittal of a similar letter from a constituent.

One was from the Clerk of the California Assembly transmitting a legislative resolution which was read at oral argument. The remaining one was a non-committal transmittal from a White House staff member of a letter to the Clerk of the California Assembly simply acknowledging receipt by the White House of the resolution.

Not a single one of these communications is even faintly suggestive of an intention to effect clandestine contact. Quite the contrary.

The Board's Orders

On May 15, 1959, the Board issued a press release announcing its tentative decision to remove the restriction on American's New York-San Francisco services (Tr. 4729).

On September 2, 1959, the Board issued Order No. E-14412 granting American's application (Tr. 4730-91).

In petitions to the Board for reconsideration and a stay of this Order, among other things petitioners for the first time asserted that they had been denied a fair hearing for the reason that the communications contained in the public correspondence file constituted improper ex parte communications to and attempts to bring pressure to bear on the Board (Tr. 4793-4818, 5117-51).

Northwest, the unsuccessful applicant, also filed a petition for reconsideration but did not raise the ex parte matter (Tr. 5104-17). Nor did it file an answer in support of the petitions of Trans World and United for reconsideration.

Petitions for review and for a stay of Board Order No. E-14412 were filed with this Court by United and Trans World on October 22, 1959.

On October 27, the Board issued Order No. E-14586 granting oral argument on the ex parte issues newly raised in the petitions for reconsideration and denying the petitions in all other respects (Tr. 5332-42).

On October 30, 1959, this Court denied petitioners' requests for a stay of C.A.B. Orders Nos. E-14412 and E-14586. The Court retained jurisdiction over the petitions for review and authorized the Board to take further proceedings on the ex parte issues pursuant to its Order No. E-14586 and to report to the Court on such action within 20 days. In its order the Court specified that petitioners could thereafter renew their requests for a stay.

Oral argument on the ex parte issues was held by the Board on November 12, 1959. In the course of the argument, petitioners disclaimed any interest in evidentiary hearings on the ex parte matters. *The sole relief requested was that the Board's prior orders be vacated and that the New York-San Francisco case begin anew.*[21]

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[21] During the November 12 1959, argument of the ex parte matters, counsel for the petitioner Trans World stated that the facts established by petitioners were sufficient to show violations of the Board's rules and that "whatever else we might ever be able to prove in this connection would be entirely cumulative"

On November 19, 1959, the Board issued Order No. E-14664 denying and dismissing those portions of the petitions for reconsideration which had been the subject of the November 12 oral argument (Tr. 5435-65). (The other portions of the petitions had been denied previously. *Supra,* p. 23.) On the same day the Board reported its action to the Court.

The Board found that petitioners had been given a fair hearing and had failed to establish evidence of violations of the Board's rules which either prejudiced petitioners or required the disqualification of any of the parties. Chairman Durfee concurred in the majority's decision in all respects but one—he would have ordered a further inquiry into the activities of American.

On the issue of a fair hearing the Board found that petitioners had expressly disclaimed any allegation of "venality or corruption on the part of any party, staff member, or Examiner or Board member," or of disqualifying conduct or bias on the part of any member of the Board. Also noted was the absence of allegations of improper conduct on the part of third persons who communicated with the Board. The Board further found that the communications—which were "common in similar cases"—were neither "clandes-

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(Tr. 5359). Later in his argument counsel stated that the Board's "only possible course" was to order a re-hearing on "the basic issue of the need for a third carrier" (Tr. 5360). Counsel for United stated that a further investigation of the ex parte matters "would do no more than provide added proof of what is already apparent" (Tr. 5373). On the basis of these statements, counsel for American stated that "the position of the Petitioners now is that there is no need for any further evidentiary hearing on the issue presented with respect to these communications" (Tr. 5392). Neither petitioner questioned this characterization of its position though each presented rebuttal argument.

tine" nor "covert"; they were "placed in the Board's public correspondence file in this case" and "were available for inspection at all times in the Board's Docket Section" (Tr. 5438-39, 5454).

The Board rejected petitioners' claims of prejudice arising from the receipt by the Board of written communications not served upon petitioners and not provided for by the Board's rules. It found that the communications had not been considered part of the record for purposes of decision and had in no way influenced the outcome of the proceeding. It further found that the communications were processed by staff members and were rarely brought to the attention of Board members except for purposes of signing letters of acknowledgment prepared by the staff members (Tr. 5438, 5454).

The Board also rejected petitioners' contention of wholesale violations of its Rule 2 prohibiting "private" communications "on the merits," and attempts to bring pressure to bear on the Board, in "cases to be determined after notice and hearing." Since all of the communications were placed in the public correspondence file, none was found to have been "private" (Tr. 5438, 5443). The Board further held that there was serious question as to whether the matter of instituting the proceeding was one "requiring notice and hearing" and whether the Rule applied to the period prior to the Board's order of January 13, 1958, instituting the case, when the allegedly objectionable activity largely took place (Tr. 5442-43). Similarly in doubt was the application of the Rule to those communications received after the start of the proceeding which were either non-committal or related only to procedural matters and were therefore "not on the merits" (Tr.

5443). While the Board decided to apply the Rule to all of these matters, it felt that the applicability of the Rule was so "unclear" as to require the initiation of rule-making proceedings to develop a clearer rule for the future (Tr. 5442-43).

Even on the basis of a "strict interpretation" of an admittedly "unclear" Rule, the Board found only a few violations, none of which prejudiced petitioners or disqualified any of the parties.

The Board took exception to four instances, all occurring in 1957, when employees of American allegedly communicated with travel agents who wrote to the Board, or communicated with their Congressmen who in turn wrote to the Board, urging only that a hearing be held. The Board found that these activities fell far short of a "campaign of pressure," that the violations were "minor" and were clearly not disqualifying and had in no way prejudiced petitioners (Tr. 5449-53).

As to San Francisco, the Board was principally concerned with instances in 1957 when Congressmen had allegedly been solicited by the City to urge the Board to hold hearings. The Board held that none of this prejudiced petitioners. Noting the "propensity of public officials to support spontaneously requests for additional air service," the Board found that many of these expressions of Congressional interest could well have been spontaneous (Tr. 5447-48). As to those for which San Francisco appeared to be responsible, the Board found that such communications should in the future be discouraged, but that they were understandable in view of the vagueness of the Board's rules and were not serious enough to merit penalizing New York and American (Tr. 5448-49).

Finally, the Board found that petitioners had been tardy in making their allegations of improper conduct since "the great bulk of the communications reflecting the pattern of conduct to which objection is made" were in the public correspondence file prior to the institution of an evidentiary hearing. Thus, petitioners had ample opportunity long before the Board reached its decision in this case to bring these charges forward and to give the Board an opportunity to cure "supposed prejudice" (Tr. 5456-57).

Following the issuance of Order No. E-14664, Trans World and United filed petitions with this Court renewing their petitions for stay. A stay was denied by order of the Court issued December 24, 1959.

SUMMARY OF ARGUMENT

The Ex Parte Matters

The facts of this case do not support petitioners' sweeping assertions.

The alleged ex parte communications largely relate to a period before the *New York-San Francisco* case was begun. They consist of written communications—typical of those received by the Board in other cases—which were placed in the Board's public correspondence file maintained in the proceedings below, and a conference held by the Board with representatives of the City of San Francisco, a transcript of which was made to be available to petitioners.

These facts bear not the slightest resemblance to the clandestine, behind-the-scenes contacts between parties and commissioners during formal proceedings alleged in the FCC "influence" cases much relied on by petitioners.

Nor do the facts provide support for petitioners' claim of denial of a fair hearing. The small number of communications received after the case was begun in January, 1958, were inconsequential and it is plain that petitioners were not thereby denied a fair hearing. Prior to January, 1958, when the majority of the communications were sent and when the Board's conference with representatives of San Francisco was held, the only question before the Board was whether a case should be instituted. Petitioners were not denied a fair hearing by these communications or by the conference. Thereafter, petitioners had a full hearing with every possible opportunity to convince the Board of the merit of their cases.

If in fact there were any violations of the Board's rules, they were neither substantial nor prejudicial. The applicability of the Board's rules to *any* of the communications or to the conference is doubtful—and the Board so held. Even a hyper-technical application of the rules would disclose—at worst—a few minor violations of the rules which in no way prejudiced petitioners and did not reflect adversely on American or San Francisco.

Petitioners' Other Contentions

There was no error in the refusal to reopen the record for additional evidence on jet costs. The Board based its findings on detailed estimates which, it properly found, were more reliable than data based on the shakedown period of initial operation of the aircraft.

Nor was there error in the refusal to produce the staff report. There was no showing that the report was needed for cross-examination or that it contained essential facts—indeed, the pertinent facts were peculiarly within the knowledge of petitioners.

ARGUMENT

I. No re-hearing is warranted by virtue of the so-called ex parte communications.

The petitioners, by exceedingly broad-brush treatment of the facts, have sought to insinuate into this case an impression of subterranean influences which deprived them of a fair hearing. In a somewhat minor key they contend that the failure to serve on the petitioners copies of the communications in question violated the Board's Rules of Practice in a way fatally prejudicial to them. They do not urge that any alleged conduct of American in connection with these communications disqualifies it from receiving the nonstop right conferred by the Board's decision; United does not touch on the point and Trans World, in a somewhat half-hearted footnote (Brief, p. 35), says that American "might be" disqualified but that the question need not be reached.

When oral argument was held before the Board on the charges made in the petitioners' petitions for reconsideration based on these communications, counsel for both of the petitioners made it clear that a further evidentiary hearing on their charges would serve no purpose and that the relief they sought was a complete de novo re-hearing of the *New York-San Francisco* case itself. This, they contended, was compelled by the material they had brought forward in their petitions for reconsideration. *Supra,* pp. 23-24.

It should be observed, preliminarily, that the communications in question are commonplace. Attached to American's answer to the petitions for reconsideration (Tr. 5203-76) are random excerpts from the public correspondence files of other CAB route proceedings which abundantly demonstrate that there was nothing unusual about the contents of the public correspondence file in this case. In those excerpts, indeed, there are found extra-record letters supporting route applications of these very petitioners. The Board found—and the petitioners do not challenge the finding—that such communications are "common in similar cases" (Tr. 5454). A copy of these excerpts was attached to American's Opposition to Stay of October 28, 1959, filed in this Court.

We do not suggest that a wrong oft-repeated is therefore right. But that what happened here is commonplace has a direct bearing on the crucial question whether, if there were a wrong at all, it was either substantial or prejudicial. It also has a bearing on the seeming wide-eyed, innocent ignorance which is implicitly suggested in some of the petitioners' arguments. And it certainly has a bearing on the question whether the Board's rules were as clear, prior to the decision in this case, as the petitioners seem to contend. The Board's own determination that its rules were not clear in their application to the circumstances here in question is supported by most substantial evidence.

In any case, when the facts of this case are examined, it will be seen not only that the characterizations with which the petitioners' briefs abound are unwarranted but that there was no wrong committed, save at worst of the most minor and technical nature.

A. BOTH THE PUBLIC TREATMENT AND THE NATURE OF THE COMMUNICATIONS DISTINGUISH THIS CASE FROM THE "INFLUENCE" CASES CITED BY PETITIONERS.

There is no doubt that the facts of this case are a far cry from those of the FCC and other "improper influence" cases upon which petitioners place heavy reliance.

1. There is no allegation of venality or corruption on the part of any of the parties in this case or on the part of any staff member, Examiner or Board member.

2. There is no suggestion of any improper personal meeting, contact or even correspondence *at any time* between any representative of American, the winning applicant, and any staff member, Examiner or Board member.

3. With one exception there is no allegation of any improper personal meeting, contact or correspondence between the representative of any party other than American and any staff member, Examiner or Board member *subsequent to the start of the case*. The lone exception is a telegram from the Mayor of San Francisco asking only that the Board adhere to its original schedule and conclude the hearings in July, 1958, *supra*, p. 17—a request which the Board rejected in accordance with petitioners' wishes.

4. Complaint is not based on any alleged wrongdoing on the part of any third person, including members of Congress and other government officials.

5. There is no suggestion of private, clandestine communications of any sort. Each of the communications of which petitioners complain was placed in the Board's public correspondence file and was at all times readily available for inspection in the Board's Docket Section. Similarly, immediately following the December, 1957, conference between representatives of San Francisco and the Board—held prior to the start of the case and long prior to the evidentiary hearing—a transcript thereof was made available to petitioners. *Supra*, p. 14.

6. There is no allegation that any member of the Board was consciously influenced by any of the communications or would be disqualified from sitting in judgment in this proceeding.

7. None of the communications can be said to be objectionable in content, much less vicious. The very small minority which related to the merits merely repeated routine and generalized arguments which were made and fully contested on the record.

8. The Board expressly and unanimously found that it had not relied upon any of the communications in question in reaching its decision.

These eight factors sharply distinguish this case from the FCC "influence" cases,[22] and from the other cases involving procedural improprieties[23] which petitioners have cited.

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[22] Each of the FCC cases involved *private* communications with a Commissioner by an applicant, his agent, or persons with a direct pecuniary interest in the outcome of the case. Massachusetts Bay Telecasters v. FCC, 104 App. D.C. 226, 261 F.2d 55 (1958) (a series of private conferences between representatives of various applicants and a Commissioner after the close of the evidentiary hearing); Sangamon Valley Television Corp. v. United States, 358 U.S. 49 (1958), *on remand*, ... App. D.C. ...., 269 F.2d 221 (1959) (personal visits paid and gifts and letters sent by a prospective licensee to the Commissioners); WORZ, Inc. v. FCC, ... App. D.C. ...., 268 F.2d 889 (1959) (statements privately made to a Commissioner concerning the qualifications of one of the applicants). In WKAT, Inc. v. FCC, 103 App. D.C. 324, 258 F.2d 418 (1958), there was a suggestion of venality as well as personal visits by applicants' representatives with a Commissioner. (See also Examiner Stern's initial decision on remand, 17 P&F 1001 (1958).) WIRL Television Corp. v. United States, 358 U.S. 51 (1958), *remanded*, 102 App. D.C. 341, 253 F.2d 863 (1958), apparently because of an interrelationship with the *Sangamon* case.

[23] The other cases cited by Trans World, at pp. 15-16 of its brief, which purport to bear on the ex parte matter, involve the following facts: attempted bribery of a judge by an attorney, Root

B. THE PETITIONERS WERE NOT DENIED A FAIR HEARING BY THE SO-CALLED EX PARTE COMMUNICATIONS.

Each petitioner argues that it was denied a fair hearing by virtue of the so-called ex parte communications. Their arguments as to why this was, however, differ very considerably.

Trans World's argument appears at pp. 12-23 of its brief. It is that ex parte submissions by influential political figures and others were so prejudicial as to have vitiated the proceeding.

United's argument appears at pp. 28-32 of its brief. It seems to be, primarily, that the "pressure" on the Board led it to hold a hearing in this case before evidence of actual jet operations was available. Specifically it contends that "In the period of six months" between the Board's denial of American's motion to institute a case (in June, 1957) and its order starting this proceeding (in January, 1958) "the Board had been deluged with a flood of correspondence, and editorially abused by the San Francisco press" (Brief, p. 28).

It is a sufficient answer to United's argument to point out how grossly it misrepresents the facts. What happened in the six months in question is fully set forth, *supra,* pp. 13-15. There is not the remotest showing of any "deluge" either of correspondence or editorial abuse. The correspondence to the Board was scant and inconsequential; and there is not even a reference to a single editorial, much less to editorial

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Refining Co. v. Universal Oil Products Co., 169 F.2d 514 (3d Cir. 1948); improper conduct of a judge in exchanging insults with a defense attorney, Offutt v. United States, 348 U.S. 11 (1954); judge presiding over a case after conducting a "judge-grand jury" investigation which resulted in charges being brought against the defendant, In re Murchison, 349 U.S. 133 (1955). Further comment on these cases seems unnecessary.

abuse. United's brief significantly fails to cite the record. And in its statement of the case under the heading "The Issue of a Fair Hearing" (Brief, pp. 8-11) there is no clue as to the evidence of this mythical "deluge" during the period in question.

We submit, without further argument, that in the very minor portion of the public correspondence file reflecting so-called ex parte communications after the proceeding was instituted in January, 1958, *supra,* pp. 17-22, there is no support for any argument that a fair hearing was denied thereby. We shall advert, *infra,* pp. 40-45, to the question whether this portion of the file shows any violation of the Board's Rules of Practice.

As to what happened before the January, 1958, order instituting the proceeding, little need be said. All but 38 pages of the 199 pages of the file dealing with that period reflect communications to or from the Board ante-dating the Board's denial of American's motion in June, 1957. *Supra,* pp. 12-13. United says that this denial was "in line with the Board's normal procedures" (Brief, p. 28). And Trans World has not pointed to a single syllable in any of those communications—even if the Board members had been aware of them—which clouded in any way the fairness of the hearing it received after January, 1958, or of the consideration that the Board gave to the decision of the case in May to September, 1959. It need hardly be added that there is nothing in the file for the period between June, 1957, and January, 1958, impairing the fairness of the later hearing; nor does Trans World intimate that there is.

Supra, p.13

This leaves the December, 1957, conference with representatives of the City of San Francisco. *Supra,* pp. 14-15. This was fully disclosed to the petitioners. The 17 page transcript of the conference indicates nothing that the petitioners could not fully deal with at the hearing, or, indeed, that they did not seek to deal with.

If an intellectually honest agency affords a full hearing, there can be no complaint that it may have entered upon the hearing with some advance impression or preconception of the merits. So it has been authoritatively determined in circumstances where advance "prejudice" was much more real than anything suggested here. *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 700-701 (1948); *United States* v. *Morgan,* 313 U.S. 409, 420-421 (1941). *Cf. Phillips* v. *Securities and Exchange Commission,* 153 F. 2d 27, 32 (2d Cir. 1946), *cert. denied,* 328 U.S. 860 (ex parte discussion leading to development of an agency view on a key issue prior to hearing held not to vitiate subsequent decision after full hearing); *In re American & Foreign Power Co.,* 80 F. Supp. 514, 525 (S.D. Me. 1948). It is not contended that the Board that decided this case was not intellectually honest; any such contention has been expressly disclaimed.

And in this case, neither petitioner has suggested that the pre-January, 1958, communications (nearly all of which ante-dated the denial of American's motion in June, 1957) even led the Board members to have some advance impression or pre-conception of the merits when the case was submitted to them at the end of April in 1959 or that in deciding the case they were even aware of those communications of two years before.

C. THERE WAS NO PREJUDICIAL VIOLATION OF THE BOARD'S RULES OF PRACTICE.

It is not the law that any violation of the Board's Rules of Practice vitiates a proceeding. Violations must be both substantial and prejudicial. *Sangamon Valley Television Corp.* v. *FCC,* App. D. C. , 269 F. 2d 221, 225 (1959).[24]

Until the Board's opinion accompanying the last of the orders under review, Order No. E-14664 of November 19, 1959, rendered after the argument to the Board of the so-called ex parte issues, it had never been decided by the Board on any occasion that the Board's Rules of Practice relating to ex parte communications apply in connection with a route proposal prior to the time the Board initiates a proceeding by notice of pre-hearing conference or otherwise.

Nor had it ever been decided that a Rule referring to a "communication on the merits of the case" embraced a communication dealing with such procedural matters as whether a hearing should be held, or when or where a hearing should be held.

Nor had it ever been held that an effort to enlist the support of Congressmen or of State or civic officials or agencies for a city's desire to have a hearing on a route proposal amounted to an effort "to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board. . . ."

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[24] The cases cited by Trans World, at pp. 23-24 of its brief, do not stand for a contrary rule. In each, the failure to conform with the rules resulted in manifest prejudice: Service v. Dulles, 354 U.S. 363, 387-88 (1957), dismissal of Federal employee contrary to regulations; Jefferson Amusement Co. v. FCC, 96 App. D.C. 375, 377, 226 F.2d 277, 279-80 (1955), dismissal of application without hearing; Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954), decision of Immigration Board ordering deportation of petitioner influenced by the Attorney General; American Broadcasting Co. v. FCC, 85 App. D.C. 343, 349, 179 F.2d 437, 443 (1949), modification of license without hearing; U.S. ex rel. Ohm v. Perkins, 79 F.2d 533, 534 (2d Cir. 1935), decision by examiner who had not sat on the case.

The Board opinion here—in apparently finding some very limited violations of its rules by the City of San Francisco during the period prior to the institution of the proceeding in January, 1958—itself reflects the uncertainty of such a determination and the need to consider the problem further in a rule-making proceeding.

Admittedly the City of San Francisco sought the aid of its Congressmen in furthering their desire for a hearing on the nonstop question. The Chairman of the City's Public Utilities Commission openly admitted the fact—he said so in a public hearing in San Francisco (which was somewhat unfairly reported in the press) and he admitted the fact to the Board in the December, 1957, conference, the transcript of which was immediately made public. This admission was not an act of arrogance. It was a candid statement that a city presumes that when it has a Washington problem it should seek the aid of its Congressmen in legitimate steps to solve the problem. *Supra,* p. 15.

King Canute engaged in no more hopeless task than would the Board or this Court were cities to be told that they cannot advise their Congressmen of their problems, or that, in doing so, they have the obligation to see to it, at their peril, that their Congressmen send copies of any correspondence with Washington agencies to all persons who are parties to a given proceeding—*or who might be parties to a prospective proceeding if one is instituted.*

The Board has no established procedure for determining whether to institute a proceeding. *Supra,* pp. 3-7. When American filed its motion in May, 1957, it did in fact serve copies thereof on the petitioners. But there was no rule of the Board, nor was there any other requirement of the Board, that such a motion be served on anyone.[25]

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[25] The absence of a Board rule governing procedures leading to the activation of a route proceeding and the fact that the activation of a case in no slightest degree resolves conflicting private claims, distinguish this case from Sangamon Valley Television Corp. v. FCC, ... App. D.C. ...., 269 F.2d 221 (1959), which decision petitioners claim requires reversal of the Board's action here.

Sangamon dealt with the problem of allocating TV channels among communities. By a rule-making order, the FCC had shifted a channel from Springfield, Illinois, to St. Louis, Missouri. At the time of the FCC's order it had no general regulation governing procedure for determining channel allocations, but "it was its usual practice, followed in this instance," to specify, in each case, that written comments and reply comments be submitted by interested parties by a certain date, with the express provision that thereafter no additional comments could be filed without permission. 269 F.2d at 223, 225.

Instead of confining himself to the submission of such comments, a St. Louis operator, interested in having the channel shifted to St. Louis on the expectation that he would then have a good opportunity to secure the license for its operation, "lobbied" with each FCC member in the members' offices, took them to lunch, sent them turkeys, and sent each member a private letter setting forth proof that the shift should be made. "These letters did not go into the public record." *Id.* at 224.

Allocation of channels, of course, determines whether there is to be an operation at all in a given city. Hence the question of shifting the channel from Springfield to St. Louis necessarily involved a resolution of the conflicting aspirations of the Springfield operator as compared with the St. Louis operator—a "resolution of conflicting private claims to a valuable privilege." *Ibid.*

This Court held that, though rule-making in form, the allocation of channels resolved conflicting private claims and the FCC's decision on the channel allocation was vitiated by "the private approaches." *Ibid.* The opinion then goes on to state that the proceeding needed reopening also because of action "substantially and prejudicially" violating the FCC's rule that no comments could be received after the time for filing had expired. *Id.* at 225.

In the present case, there was no established procedure for de-

In these circumstances it would require a most hypertechnical version of rules to brand improper the sending by the Mayor of San Francisco to the Board, in May, 1957, of copies of the numerous resolutions of civic bodies in the Bay Area and the other civic material he transmitted, *supra*, p. 12, unless he sent copies to the petitioners. That there should be any such requirement, we submit, would never have occurred to San Francisco's Mayor, or to the executives of any other civic agency—particularly when the Act gives any interested person an absolute right to file memoranda in support of any certificate amendment application and when neither the Act, nor any regulations thereunder, even purport to impose conditions on the right to file such memoranda with the Board. *Supra*, pp. 4-5.

Laying aside these civic expressions and Congressional letters—most of which, incidentally, were mere inquiries or were perfectly harmless expressions of support for the desired hearing—the contents of the public correspondence file become so inconsequential as to make frivolous any argument that they reveal a wrong, much less a prejudicial wrong.

This is particularly the case since, after January, 1958, the petitioners were given the most complete opportunity to present their evidence, opinions, and

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termining whether a proceeding should be instituted. The only preliminary procedure in fact followed—the motion procedure—terminated in favor of the petitioners in June, 1957. Even that procedure did not purport to be the exclusive procedure; and it had not been prescribed by the Board. Nor could a determination merely to institute a proceeding be prejudicial; it was in no way comparable to the allocation of channels, which conclusively determines private rights. Furthermore, the alleged ex parte communications here were not, in their nature, of the objectionable quality of those in *Sangamon*. Nor was anything here kept private or secret; everything was publicly filed.

arguments. And even if they had been blissfully ignorant of the contents of the public correspondence file theretofore—and, of course, they were fully aware of the existence of such a file, and of San Francisco's vigorous efforts to muster civic support—they were certainly alerted by the transcript of the December, 1957, conference, to say nothing of the previous newspaper reporting of San Francisco's efforts, to the fact that San Francisco had been diligent in seeking Congressional help. Hence there can be no possible substance in any suggestion that the petitioners were not fairly on notice of the strong civic support of and Congressional interest in San Francisco's case. Therefore they had every opportunity to prepare and present their own cases that they could possibly ask for. Only if something happened *thereafter* which prejudicially violated the Board's rules can they make complaint.

After the institution of the proceeding, San Francisco itself sent one, single so-called ex parte communication on a procedural question which the Board promptly decided against San Francisco and in favor of the petitioners. *Supra,* p. 17.

Nothing else happened of which complaint could possibly be made, unless it be with respect to the written submissions in connection with the oral argument from the Governor and various Congressmen. *Supra,* pp. 19-22.

This raises the question of the Board's Rule 14. The last sentence of that Rule permits any representative of any branch of the Federal Government or of a state government to "appear and present oral argument in any proceeding" (*i.e.,* any route proceeding or any other proceeding).[36]

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[36] 14 C.F.R. § 302.14. The text of the Rule is set forth in the Appendix of United's brief at p. A-4 and in the Appendix of Trans World's brief at pp. 39-40.

From the Board's very earliest days it has permitted Congressmen to appear before it and to make statements at oral arguments. Usually this occurs in route cases. It would seem obvious enough that Rule 14 was not written with that in mind, but the Board has construed it to cover the matter.

Neither petitioner attacks this practice, even though the petitioners, like everyone else, realize that these Congressional statements are not oral argument at all, but are benevolent speeches for the community interests involved.

Once the Board permits these Congressional appearances it is as inevitable as the rising of the sun that busy Congressmen are often going to send written communications in lieu of oral statements. Sometimes these communications are solemnly read at the oral argument by the Congressman's assistant. Perhaps more often they are mailed to the Board.

When they are mailed, they are deposited in the public correspondence file. Sometimes when some of them are gathered together by the staff before the argument is held the Chairman of the Board will courteously announce at the argument that they have been received and will be included in the public docket. That, indeed, happened in this case. *Supra,* pp. 20-22.

The reason for sending written statements is that Congressmen are very busy. Moreover sometimes, like other human beings, they are ill (*e.g.,* Tr. 320) or out of town.

Rule 14 contains absolutely no provision for such written statements in lieu of the Rule 14 oral appearance. The Rule does say, in a portion preceding the sentence allowing these oral appearances, that *any* person may present a written statement on the issues in a proceeding which shall conform to the requirements with respect to "form, content, service, and time of filing" of briefs of the parties. *Supra,* p. 4, n. 4. But no one has yet suggested (unless these petitioners mean to) that that requirement is applicable to the written statements sent by Congressmen in lieu of their Rule 14 oral appearances. It would be quite absurd seriously to make such a suggestion. It would be physically impossible for these Congressional statements to comply with the Board's requirements for parties' briefs as to form (Rule 3(b) of the Board's Rules of Practice, 14 C.F.R. § 302.3b), content (Rule 26, 14 C.F.R. § 302.26), or service (Rule 8, 14 C.F.R. § 302.8). And certainly such statements could not comply with the requirement for time of filing briefs (Rule 31, 14 C.F.R. § 302.31) for often it is only at the last minute that a Congressman discovers that he cannot attend the argument.

It is also an accepted fact that parties to a case enlist Congressional support at the argument. Indeed the Court of Appeals for the Second Circuit recently decided that even a carrier party might lawfully do so, in advancing its interest at a route case oral argument, when that Court rejected a contention that that carrier had "directly or indirectly" solicited such support and thereby error had been committed (Brief of Capitol Airways, Inc., p. 22, *Eastern Air Lines, Inc.* v. *CAB,* 271 F. 2d 752, 760 (1959).

However, it is unquestionably true that Congressmen, who are notably alert to home affairs, register such support without solicitation.

In any event, in this case there was Congressional support both in oral appearances and in written statements submitted in lieu of oral appearances. The latter, placed in the public correspondence file, we have cited *supra,* pp. 19-22. And the cases are numerous, indeed, where the Board has witnessed a comparable or greater amount of Congressional interest.

If there was any violation of the Board's rules in this case during the period after January, 1958, it was in the sending of these written statements without service on the parties to the proceeding. But we suggest that it would be grossly unrealistic to hold that this long-established and well-known Congressional practice is a violation of the Board's rules—or, if it were, that it was either substantial or prejudicial, particularly when the statements themselves are examined and when it is realized that the Board Chairman announced at the argument that five of them had been received and were being filed, and no one objected. *Supra,* pp. 21-22.

Finally, as to all of the communications—the Congressional and the other communications—even the remotest possibility of prejudice was banished by the Board's finding that it did not consider the communications in reaching its decision and that they did not influence its decision (Tr. 5438). Similar disclaimers have been accepted even where the extra-record communications set forth facts not of record which would bear critically on the issues in the case. See, *e.g., Eastern Air Lines, Inc.* v. *CAB,* 271 F. 2d 752, 758 (2d Cir. 1959). *Cf. Sisto* v. *CAB,* 86 App. D.C. 31, 35-36, 179 F. 2d 47, 51-52 (1949). Here, the communications did not set forth any facts which were not in the record. Indeed, examination of the Congressional communications discloses that they were merely expressions of Congressional interest confirming what the Board and everybody else knows—that "all public officials . . . will favor new or additional air service" (Tr. 5457).

Apart from charges regarding San Francisco's conduct, the petitioners made limited charges concerning American. These are readily disposed of.

Near the time of oral argument in 1959, each of five travel agents briefly wrote or wired a member of Congress favoring American's application. Each Congressman transmitted the letter to the Board (Tr. 251-52, 261, 258-59, 267, 330-31).

Earlier—in 1957—when American's motion was pending, each of four travel agents wrote or wired either a member of Congress or the Board itself in support of American's motion (Tr. 361, 375-76, 400I).[27]

Affidavits were submitted by United indicating that these communications were suggested by an employee of American (Tr. 5145-51).[28]

As the Board held (Tr. 5452), American was privileged to ask travel agents to express to Congressmen their support of American when the aim is to seek appearances by such Congressmen before the Board in accordance with Rule 14. *Eastern Air Lines, Inc.* v. *CAB, supra,* p. 42. Hence there can be no complaint concerning the travel agents' communications with their Congressmen in 1959.

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[27] In one such case, the letter was placed in the record file of this proceeding instead of in the public correspondence file (Tr. 115). Trans World refers to this as an instance of an ex parte communication being put in the "record" without notice to the parties. TWA Brief, p. 7. The Board pointed out that such misfiling of the letter was inadvertent (Tr. 5454). It is evident that a filing clerk's mistake of this nature is not significant.

[28] It should be noted that the affidavits submitted by United as to an American employee's having suggested the travel agents' communications are quite vague. Furthermore they fall far short of showing that any suggestion was made that any travel agent actually write the Board.

As to the four communications by travel agents in 1957, the Board found them to be improper (Tr. 5451-52). At that time there was no oral argument pending at which a Congressman might appear, nor was there occasion for a travel agent to be sending a letter to the Board. But, as the Board held, a mistake of judgment by an American employee in suggesting such action[29] on these isolated occasions was not a substantial wrong (Tr. 5452-53). Nor, indeed, was it prejudicial. American's motion with which these communications were concerned was actually denied after they were sent. Furthermore, in all the circumstances, they could have had no significant effect. In any case, the petitioners received a full hearing long after these incidents.

II. THE BOARD DID NOT ERR IN REFUSING TO REOPEN OR TO REQUIRE SUBMISSION OF A PRELIMINARY STUDY BY ITS STAFF OF THE NEW YORK-SAN FRANCISCO MARKET.

THE DENIAL OF UNITED'S MOTION TO REOPEN

In instituting this case, the Board recognized that it would be dealing with an "imminent" jet service and with "planned" jet operations, *supra*, p. 16—not with actual experience with jets. So the evidence on jet costs was in the form of estimates.

A principal point now made by United is that the Board erred in failing to reopen the record to receive "the most accurate knowledge available" concerning jet costs (Brief, p. 31).

American was the first carrier to institute transcontinental jet service. It began in late January, 1959. United itself did not begin jet operations until after the Board's decision in this case, in September, 1959.

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[29] But see n. 28, *supra*.

One month after American inaugurated jet service and on the eve of the issuance of the Examiner's initial decision, United moved to reopen the record. Its brief here states that upward changes in *anticipated* jet costs had by then become "apparent." "In particular," says United, "American had added a third pilot to its flight crew and a fourth stewardess" (Brief, p. 31). United also called the Examiner's attention to statements by American that actual jet costs were "higher than anticipated" (Brief, p. 9).

United's motion was denied by the Examiner, United appealed to the Board, and the Board sustained the Examiner in its final decision (Tr. 4752). At that time, says United, the Board had available "additional evidence of increasing jet costs" (Brief, p. 9).

American fully answered United's contentions in its reply to United's motion to the Examiner to reopen (Tr. 4070-71), in its answer to United's motion for permission to appeal the Examiner's ruling (Tr. 4166-69), and in its answer to United's petition for reconsideration (Tr. 5179-82, 5201).

In a nutshell: Actual jet costs for one month or even several months of initial operations are not reliable for future decisions because of the inevitable "bugs" in the early period of operation, as the Board held (Tr. 4751). American's statements that jet costs had been higher than anticipated reflected *only* the conditions of the initial period (Tr. 4070). In fact, figures on direct flight costs during the first six months of 1959 (based on carrier reports stipulated into the record) showed direct flight jet costs substantially lower than the estimates in evidence in this case (Tr. 5181-

82). And the estimates themselves had included large allowances for contingencies which more than compensated for factors referred to by United (Tr. 5181).

It is not surprising that the Board refused to reopen. As it pointed out, the estimates in evidence in this case were highly reliable, based on extensive testing, analysis, and study (Tr. 4751). Indeed, there is probably nowhere as complete and reliable an exposition of jet economics as is to be found in this record.

This is not the first time that United has urged that a case should be reopened because it lacked evidence of actual operating experience with a new type of craft. United made the same contention to this Court in *United Air Lines* v. *CAB,* 81 App. D.C. 89, 93-95, 155 F. 2d 169, 173-175 (1946), when it urged that Western Air Lines should not be awarded the Denver-Los Angeles route until actual operating experience with new four-engined aircraft had been reflected in the record. United's argument then was not persuasive. It is even less persuasive now.

THE REFUSAL TO PRODUCE THE STAFF REPORT

There was no error in refusing to require production of the study made by the CAB staff which the Board considered before it decided, in January, 1958, to institute this proceeding.

It was Trans World that demanded production of this study at the hearing (Tr. 2020-23). The demand was made in connection with the testimony of a CAB staff member at the hearing.

However, there was no pretense that the study was needed to attempt to show prior inconsistent statements. It was not suggested that the staff member had participated in the preparation of the study (Tr. 2020-21). In fact, his testimony was based entirely on a collation of statistics submitted by the parties to this case in their exhibits and he took no position on the issues in the case (Tr. 3529-35). The purpose of the demand, as stated by Trans World's counsel, was to lay a foundation for subpoenaing other members of the Board's staff (Tr. 2022-23). But he did not need the study for that purpose; he was free to subpoena anyone. The study, moreover, was made solely for the purpose of aiding the Board in determining whether to hold a hearing. Trans World made no effort to show that it might reveal any data which the parties did not have or that it was in any way necessary to enlightenment of the issues pointed up at the hearing. The evidence of the parties themselves, who possessed all the relevant facts,[30] was the really pertinent evidence. The staff study could add nothing at the hearing stage to the information needed by the Board or the parties for grappling with the issues.

CONCLUSION

Other issues raised by the petitioners seem too inconsequential to warrant briefing by us as intervenor.

The Board's order should be affirmed. American's service, long sought by the public at both terminals, serves a pressing public need, frees this market from the "soft" competition which was provided as long as Trans World was United's only competitor (Tr. 4745-

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[30] *Cf.* Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958); G. & P. Amusement Co. v. Regent Theater Co., 9 F.R.D. 721 (N.D. Ohio 1949); Dellameo v. Great Lakes S. S. Co., 9 F.R.D. 77 (N.D. Ohio 1949).

46), and ends the discrimination which San Francisco has suffered for years in relation to its rival metropolis of Los Angeles.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing brief to be served on all parties to this proceeding by delivering copies thereof to the offices of the following:

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American Airlines, Inc.

February 15, 1960

APPENDIX A

The pertinent provisions of the Federal Aviation Act are as follows:

Section 401 (a-c, g) (72 Stat. 754, 49 U.S.C. § 1371)

(a) No air carrier shall engage in air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.

Authority to Modify, Suspend, or Revoke

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate:

Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

Docket No. 15,414[1]

UNITED AIR LINES, INC.

v.

CIVIL AERONAUTICS BOARD

Motion of American Airlines, Inc.
for Leave to Intervene

To the Honorable Judges of the United States Court of Appeals for the District of Columbia Circuit:

The Movant, American Airlines, Inc., respectfully represents and shows the Court the following:

1. The name of the Movant is American Airlines, Inc. (hereinafter called American). American is a Delaware corporation with its principal office and place of business at 100 Park Avenue, New York City, New York. American holds permanent certificates of public convenience and necessity issued by the Civil Aeronautics Board authorizing it to engage in domestic scheduled air transportation with respect to persons, property and mail over Routes Nos. 4, 7 and 25.

2. American was an applicant in the proceeding before the Civil Aeronautics Board known as the *New York-San Francisco Nonstop Case.* The final order in that proceeding, Order No. E-14412, adopted September 2, 1959, which petitioner challenges herein, authorized American to provide nonstop service between San Francisco/Oakland on the one hand and New York/Newark on the other.

3. The granting of the prayer of petitioner to set aside the aforesaid order of the Civil Aeronautics Board and its prospective prayer to stay the effectiveness of said order pending review will have a direct, adverse and injurious effect upon American and the public interest.

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[1] The same motion was filed in Docket No. 15,415, Trans World Airlines v. Civil Aeronautics Board.

4. Any order issued by the Court with respect to said order of the Civil Aeronautics Board would be binding upon American, and American's interest in these proceedings would not be adequately protected unless it is permitted to intervene.

WHEREFORE, the Movant, American Airlines, Inc., respectfully moves and prays that it be granted leave to intervene in the above-styled proceeding pursuant to and in accordance with Rule 38(f) of the Rules of the United States Court of Appeals for the District of Columbia Circuit, that it be granted leave to file objections to the petitions for stay which have previously been filed in this case, and for such other and further relief as may be appropriate in the premises.

Respectfully submitted,

/s/ HOWARD C. WESTWOOD
Howard C. Westwood

/s/ JOHN W. DOUGLAS
John W. Douglas

/s/ EDWIN H. SEEGER
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Of Counsel

October 28, 1959

(Certificate of Service omitted.)

PETITION OF UNITED AIR LINES, INC., FOR REVIEW

In The

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. No15414

UNITED AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION OF UNITED AIR LINES, INC., FOR JUDICIAL REVIEW OF AN ORDER OF THE CIVIL AERONAUTICS BOARD

United States Court of Appeals
For the
District of Columbia Circuit

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October 22, 1959.

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

In The

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.

UNITED AIR LINES, INC.,
Petitioner,
v.
CIVIL AERONAUTICS BOARD,
Respondent.

PETITION OF UNITED AIR LINES, INC., FOR JUDICIAL REVEIW OF AN ORDER OF THE CIVIL AERONAUTICS BOARD

To the Honorable the Judges of the United States Court of Appeals for the District of Columbia:

United Air Lines, Inc., presents this petition for judicial review of an order of the Civil Aeronautics Board, and, in support thereof, respectfully represents and alleges as follows:

I.

THE NATURE OF THE PROCEEDING

This petition for review arises out of a proceeding before the Civil Aeronautics Board in which two applicants, American Airlines, Inc., and Northwest Airlines, Inc., prosecuted applications for authority to conduct nonstop air service between New York and San Francisco in competition with the existing nonstop services of petitioner and

Trans World Airlines, Inc.* Review is sought of Order E-14412 entered by the Civil Aeronautics Board on September 2, 1959. Said order, adopted by a 3 to 2 vote of the Board, purported to certificate American as a third nonstop carrier between New York and San Francisco, effective November 1, 1959.

Petitioner has timely filed a petition for rehearing, reargument and reconsideration and a petition for a stay of the foregoing order with the Civil Aeronautics Board. Neither of those petitions has been acted upon by the Board. Petitioner is filing this petition for review and the subsequently described petition for a stay with this Court at this time for the following reasons: First, American's New York-San Francisco nonstop authority is scheduled to become effective in 10 days and the irreparable injury that petitioner will sustain will begin at that time unless relief is theretofore granted. Secondly, whether or when the Board may take action on the petitions below is unknown. One member of the majority of the Board resigned after adoption of the order under review and it is conceivable that the remaining Board members may be equally divided with respect to the disposition to be made of those petitions. Thirdly, the Court of Appeals for another circuit has held that the filing of a petition for rehearing, reargument and reconsideration does not toll the 60 day statutory period following a final order of the Board within which to file petitions for review. *Consolidated Flower Shipments, Inc.* v. *CAB,* 205 F.2d 449 (C.A. 9, 1953). Although this Court may not agree with that ruling, protection of petitioner's interests requires that it file this petition within 60 days after September 2, 1959, the date of the Board order here under review.

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* The various air carriers involved, other than petitioner, will hereinafter be referred to by commonly used abreviations of their names: Trans World Airlines, Inc., as "TWA", American Airlines, Inc., as "American" and Northwest Airlines, Inc., as "Northwest."

II.

JURISDICTION AND VENUE

This petition is filed pursuant to Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, 49 USC 1486, and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 USC 1009.

Section 1006 of the Federal Aviation Act provides, in part, that any order issued by the Civil Aeronautics Board shall be subject to review by the Courts of Appeals of the United States, or by the United States Court of Appeals for the District of Columbia, on petition filed within sixty days after the entry of such order by any person disclosing a substantial interest therein. Further, the statute provides that such petition for review shall be filed in the court for the circuit in which the petitioner resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, and provides that upon transmittal of a copy of the petition to the Board the court in which such filing is made shall have exclusive jurisdiction to affirm, modify or set aside the order complained of, in whole or in part, and, if need be, to order further proceedings by the Board.

Section 10 of the Administrative Procedure Act reaffirms the method and manner of review provided for in the Federal Aviation Act.

Petitioner, United Air Lines, Inc., satisfies all of the foregoing jurisdictional and venue requirements. Petitioner is directly affected by the Board's order in question and, therefore, has a substantial interest therein. Moreover, this petition is being filed within sixty days after the date of the Board order under review.

III.

STATEMENT OF FACTS

1. The proceeding giving rise to this petition for review is commonly known as the "New York-San Francisco Nonstop Service Case." Petitioner and TWA have provided New York-San Francisco nonstop service for a number of years. Currently, they provide such service with jet aircraft. Additional service with similar equipment was proposed by each of the applicants. The ultimate issue in the proceeding below was whether the public convenience and necessity required New York-San Francisco nonstop service by three competing air carriers each operating jet aircraft.

2. The proceeding began when American, on or about May 3, 1957, filed a motion with the Board requesting an expedited hearing on the New York-San Francisco nonstop portion of its application in Docket No. 5903. At that time and up until the present, American's certificates for public convenience and necessity required that American make at least one intermediate stop on flights between those points.

Following answers by petitioner and TWA, the Board on June 26, 1957 denied American's motion but directed its Bureau of Air Operations "to review the problem of the air service pattern between New York and San Francisco and report the results of that study to the Board on or about December 1, 1957" (Order E-11493). The Bureau prepared and submitted such a report to the Board sometime during December of that year. On December 2, 1957, when this report appeared imminent, representatives of the City and County of San Francisco met with members of the Board and its staff in a conference in which petitioner was not given an opportunity to participate.

Subsequently, on January 13, 1958, the Board reversed itself and directed an expedited hearing on American's application. In so doing, the Board emphasized that "an important factor" supporting its action was "the opportunity that will be provided for the Board's first full-scale investigation of the imminent impact of the operation of jet aircraft" and instructed its Examiner to make "specific findings on this issue" (Order E-12103). By Order of April 9, 1958, the Board, in denying petitions of petitioner and TWA for reconsideration of the prior order, reiterated the importance of "a full-scale investigation" into the impact of jet equipment during the course of the proceeding (Order E-12337).

3. After the grant to petitioner and others of leave to intervene, the consolidation of Northwest's application and a prehearing conference, the case came on for hearing before an Examiner on July 30-31, 1958 in San Francisco and September 9-18, 1958, in Washington, D.C.

Evidence submitted at the hearing included traffic, cost and revenue forecasts covering operation of the route in issue. All cost estimates were based on engineering data supplied by aircraft manufacturers as to how they expected their products to perform. Cost and traffic stimulation estimates were necessarily untested at that time because no jet aircraft had yet been delivered to any domestic air carrier. Commercial operation of jet planes in domestic air transport service first began in December 1958.

4. During the presentation by the Bureau of Air Operations at the hearing, TWA filed an application for a *subpoena duces tecum* with the Examiner requesting production of the previously mentioned Bureau report. The

Examiner denied this application, adhering to earlier rulings denying similar requests by TWA in its petition for reconsideration of the Board's Order of January 13, 1958, by TWA at the prehearing conference and by petitioner in a motion of May 8, 1958. Of the three latter requests, the first was denied by the Board (Order E-12337), while the remaining two were denied by the Examiner.

5. On February 18, 1959, prior to the Examiner's Initial Decision, petitioner filed a motion with the Examiner to reopen the record for the purpose, among others, of receiving evidence of jet operating costs derived from actual operating experience which, for reasons above shown, could not have been ascertained until after the close of the hearing. In its motion, petitioner pointed out that the Board had made the economic impact of jet equipment a primary issue in the proceeding. Further, petitioner demonstrated that operating experience had shown that the cost estimates of record were unreliable and that additional costs were being incurred which were unforeseen when the expense estimates of record were prepared. Additionally, it called attention to the fact that American, four weeks earlier in another proceeding, maintained that its own estimates of jet costs, made as recently as six months previously, were seriously understated. Nevertheless, this motion was denied. Petitioner subsequently renewed the motion before the Board where it again was denied.

6. The Examiner's Initial Decision was issued on March 9, 1959. While the Examiner broadly stated that three carriers would "be able to adjust their services to meet the demands [of the traffic] on a profitable basis," that statement was not supported by any findings whatsoever as to revenues and expenses. The Examiner's ultimate conclusions were that the public convenience and necessity required a third nonstop air carrier between New York and

San Francisco and that American should be authorized to provide the service.

7. After the filing of exceptions to the Initial Decision and briefs in support thereof, the case was set for oral argument before the Board pursuant to requests by petitioner and others. By notices dated April 3 and April 15, 1959, the proponents of additional New York-San Francisco nonstop service were given 2 hours and 20 minutes for argument, while petitioner and TWA were allotted 30 minutes each. Because of the insufficiency of time allowed to it and the disparity thereof in comparison with the time given to its adversaries, petitioner promptly requested additional time for argument. This request was denied.

At the oral argument, held on April 29, 1959, the foregoing disparity in time became even greater. Without prior notice to petitioner, 13 Congressmen and Senators—all urging adoption of the Examiner's Initial Decision favorable to American—appeared at oral argument and were given another 2 hours' time. As a result, petitioner and TWA together received a total of 1 hour for oral argument as contrasted to 4 hours and 20 minutes allotted to their adversaries.

8. On May 15, 1959, the Board issued a Press Release announcing that it had tentatively voted 3 to 2 to grant American's application. This release contained no findings whatever. Such findings and conclusions as the Board made were first set forth in its subsequent formal opinion and order.

9. The Board's formal opinion and order under review, adopted on September 2, 1959, adhered to the result announced in the prior Press Release and purported to authorize American to conduct New York-San Francisco nonstop service effective November 1, 1959. Following an

approach similar to that taken by the Examiner, the Board broadly asserted that three carriers by reducing their planned and proposed service could operate the New York-San Francisco route "at above break-even load factors." Again, however, that general statement was not supported by findings as to revenues and expenses.

10. Both the Press Release and the Board's formal opinion recited that Member Hector joined with Vice Chairman Gurney and Member Minetti in forming the majority voting for American's certification. However, Member Hector, whose vote was decisive, did not hear oral argument and there was no indication at any time during the argument that he would participate in the Board's decision.

The opinion of the Board is inconsistent with opinions expressed in recent Board cases by two members forming the majority in the proceeding below — Vice Chairman Gurney in dissents of September 3, 1958 and May 7, 1959, in the *Great Lakes-Southeast Service Case* and Member Minetti in a dissent of April 1, 1957, in the *Eastern Route Consolidation Case.* No explanation has been given for the departure by these members of the Board from their earlier views.

11. On September 22, 1959, petitioner and TWA filed petitions for rehearing, reargument and reconsideration of the foregoing decision and order. In those petitions, petitioner and TWA requested a rehearing for the purpose, among others, of receiving evidence which demonstrated that experienced jet costs were even higher than when petitioner filed its earlier motions to reopen the record. Further, those petitions, *inter alia,* called attention to *ex parte* attempts to influence the Board and its staff throughout the case. They demonstrated that in excess of 120 *ex parte* communciations had been sent to the Board or mem-

bers of its staff, and that in whole or in part these communications had been written, inspired or solicited by American and the City and County of San Francisco. Further, they demonstrated that these communications were in direct violation of the Board's Principles and Rules of Practice, as well as fundamental principles of due process.

12. To date, the Board has not passed upon the above described petitions for rehearing, reargument and reconsideration or petitioner's petition for a stay of the Board's above order pending this Court's decision in this case.

13. The foregoing chronology sets forth in summary form the handicaps under which petitioner has been forced to try this case. Time and time again petitioner was denied the opportunity to make an adequate presentation of its position, to see that all facts essential to an intelligent determination of the issues were before the Board, or fairly to answer arguments of its opponents. The total effect of the errors committed throughout the proceeding has been to deny petitioner due process and a fair hearing.

IV.

THE POINTS UPON WHICH PETITIONER INTENDS TO RELY

Petitioner, United Air Lines, Inc., submits that Order E-14412, adopted by the Civil Aeronautics Board on September 2, 1959, is invalid and erroneous for the following reasons:

1. *Ex parte* attempts by formal parties to the proceeding having interests adverse to those of petitioner, directly and indirectly, to influence the Board's decision in this case violated Sections 300.2(a) and 300.2(c) of the Board's Principles of Practice and deprived petitioner of due process

of law and of a fair hearing as guaranteed by the Administrative Procedure Act and the Federal Aviation Act.

2. The acceptance by the Civil Aeronautics Board, throughout the course of the proceeding, of *ex parte* communications calculated to influence the Board's decision adversely to petitioner violated the Board's Rules of Practice, specifically Rules 14, 18 and 24(j), and deprived petitioner of due process of law and of a fair hearing as guaranteed by the Administrative Procedure Act and the Federal Aviation Act.

3. The denial by the Civil Aeronautics Board of petitioner's timely filed motions to reopen the record to receive competent, relevant, material and available evidence of actual operating costs of jet aircraft which were placed in commercial service only after the conclusion of the hearing and which evidence would have shown that the Board's findings as to the economic feasibility of three carrier competitive service are erroneous and that certification of a third competitor would result in substantial losses for all carriers involved, constituted an abuse of discretion and deprived petitioner of a fair hearing.

4. The Civil Aeronautics Board and the members thereof by the following additional actions, both severally and in combination with each other and with the other errors alleged herein, further deprived petitioner of due process of law and of a fair hearing as guaranteed by the Administrative Procedure Act and the Federal Aviation Act:

(a) Refusal by the Board and its Examiner to direct production, or *in camera* inspection by the Examiner, of a report prepared by the Board's Bureau of Air Operations in conjunction with the proceeding and requested by petitioner for use in preparation of its case and cross-examination of the Bureau's witness;

(b) Denial to petitioner of adequate time for oral argument or an amount of time reasonably equal to that allotted to its adversaries;

(c) Failure of the Board member casting the decisive vote to hear oral argument;

(d) Failure of the other two members of the majority to set forth in the Board's opinion reasons for their departure from opinions recently expressed by them in prior proceedings; and

(e) Announcement by the Board of its vote by a Press Release prior to preparation and issuance of its formal opinion and order in the proceeding.

5. The record upon which the order of the Civil Aeronautics Board purports to be based is fatally defective in that it is devoid of reliable and probative evidence as to the cost of operating jet aircraft which is relevant to an essential issue in the proceeding, viz., whether nonstop service over the route involved by three air carriers would, or would not, be economically feasible.

6. The Board's findings and conclusion that three carriers could operate nonstop over the New York-San Francisco route without sustaining substantial financial loss, upon which the Board's decision in part rests, are without support in underlying findings, are not supported by substantial evidence in the record as a whole, and are contradicted by facts disclosed by the actual operation of jet

aircraft after the close of the hearing which the Board refused to consider, by denying requests to reopen the proceeding.

7. The Board's findings and conclusion that the services of petitioner and TWA, though not inadequate, did not fully meet the needs of the traveling public and that the public would receive the benefits of competition if American were granted nonstop authority between New York and San Francisco rest upon subsidiary findings that are in direct conflict with undisputed evidence, are not supported by substantial evidence in the record as a whole, and are predicated inaccurately and improperly upon findings as to a short period of time preceding delivery from the manufacturers in early 1957 of new aircraft ordered 2½ years earlier and with which petitioner and TWA immediately enlarged their service pursuant to plans established well in advance of the proceeding below.

8. The Board's findings and conclusion as to the volume of New York-San Francisco nonstop traffic in 1960 and succeeding years are not supported by substantial evidence in the record as a whole and disregard facts establishing that the Board's forecast embraces traffic not available for nonstop service between those points.

9. The Board failed to set forth reasons for its rejection of petitioner's traffic forecast and to make findings with respect to certain of petitioner's exceptions to the Examiner's Initial Decision to which the Board's attention was specifically directed on petitions for rehearing, reargument and reconsideration.

10. The Board's findings and conclusion that the grant

of New York-San Francisco nonstop authority to American is required by the public convenience and necessity are arbitrary and capricious and not supported by substantial evidence in the record as a whole.

V.

PETITION FOR STAY

Concurrently herewith, petitioner, United Air Lines, Inc., is filing a petition to stay the above described order of the Civil Aeronautics Board and the amended certificate of public convenience and necessity issued to American Airlines, Inc., pursuant thereto, pending review of said order by this Court.

VI.

PRAYER FOR RELIEF

Wherefore, petitioner, United Air Lines, Inc., prays that this Court review Order E-14412, adopted by the Civil Aeronautics Board on September 2, 1959; that a copy of this petition be transmitted to the Civil Aeronautics Board; that said Board be required to certify and file in this Court a transcript of the record of the proceeding in which said order was entered, a stenographic transcript of the *ex parte* conference between the Board and representatives of the City and County of San Francisco held on December 2, 1957, and all *ex parte* communications received by members of the Board and any Board employee which relate to said proceeding together with acknowledgments of the same; that upon review the aforesaid order of the Civil Aeronautics Board and the amended certificate of public convenience and necessity issued to American Airlines, Inc., pursuant thereto, be set aside; and that the Court grant to petitioner such other and further relief as the Court may deem proper.

Dated at Chicago, Illinois, this 22nd day of October, 1959.

Respectfully submitted,

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Of Counsel.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing petition to be served on all parties who have been admitted to participate in the proceeding before the Civil Aeronautics Board to which this petition relates by causing a copy thereof to be mailed, postage prepaid, to each of the following:

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Service of this petition upon the Civil Aeronautics Board, the respondent, will be made by the clerk of this Court, pursuant to the Federal Aviation Act and the Court's Rules of Practice applicable to the review of orders of administrative agencies.

Dated at Washington, D.C., this 22nd day of October, 1959.

/s/ JAMES FRANCIS REILLY
James Francis Reilly
Attorney for Petitioner

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MDBw
11 00

VILBUR K. MILLER

REPLY BRIEF FOR PETITIONER UNITED AIR LINES, INC.

In The

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15414

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAR - 1 1960
Joseph W. Stewart
CLERK

UNITED AIR LINES, INC.
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC., CITY AND
COUNTY OF SAN FRANCISCO,
Intervenors.

On Petition for Review of Orders of the Civil Aeronautics Board

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Intervenors.

On Petition for Review of Orders of the Civil Aeronautics Board

REPLY BRIEF OF PETITIONER, UNITED AIR LINES, INC.

A. THE BOARD'S ARGUMENT THAT IT IS NOT BOUND BY ITS OWN PRINCIPLES AND RULES OF PRACTICE.

Petitioner, United Air Lines, Inc., is shocked by the opening argument made in the brief of the respondent, Civil Aeronautics Board. The only conclusion which can be drawn from statements which are repeatedly and categorically made is that, so long as the Board declares itself to be satisfied with the fairness of its decisions, it does not consider itself bound by its own Principles and Rules of Practice, by the Administrative Procedure Act, or by the constitutional guarantee of due process. Counsel for the Board state, and state without qualification, that efforts by interested parties to bring pressure to bear upon it, or otherwise improperly attempt to influence the Board's decisions, will not vitiate a proceeding so long as the Board itself concludes that the attempt was unsuccessful, and that the Board is free to listen to evidence or argument in private as well as in public so long as it is willing to declare that it can disregard what it has thus heard when the time for its deliberations and decision arrives.

The following excerpts from its brief, leaves little room for argument as to the position of the Board:

> " * * * prior precedent makes clear that its disclaimer of consideration of the materials here in question *must be accepted.*" (Br. p. 17) [Emphasis added]
>
> "The short answer to petitioners' arguments is the Board's disavowal of any consideration of the material in its correspondence file in deciding this or any other case. * * * Since the material as to which petitioners complain was not taken into account by the Board, the proceeding was completely fair to petitioners and in no way vitiated." (Br. pp. 21-22)
>
> "We submit that where the agency is acting openly and publicly, as in the present case, *its disclaimer must be accepted;*" (Br. p. 23) [Emphasis added]
>
> "For it makes no difference on this point that some of the communications from public officials or others which went into the public correspondence file were inspired by American or San Francisco (or indeed, sent by the latter party). If it is accepted (as we urge it must be) that the Board does not consider material in this file in deciding the case, it is immaterial whether the letter being politely acknowledged and then ignored comes from the public official voluntarily or as a result of a party's solicitation." (Br. p. 26)

Simply stated, it is the position of the Board that it is not subject to the rules of evidence and procedure which petitioner had assumed to be universally recognized as necessary to protect the integrity of our judicial process.

It is small wonder that the Department of Justice finds itself in the rare position of being unable to support the views of the agency which it is representing.

B. THE BOARD'S EXCUSES FOR IGNORING THE VIOLATIONS OF ITS PRINCIPLES AND RULES OF PRACTICE.

While the Board takes the categoric position that this Court has no right to even review the Board's decision to ignore the admitted violations of its Principles and Rules of Practice, or to consider in any way the propriety of that action, it does at the same time seek to find some excuse for its refusal to do anything about those violations.

It concedes that improper efforts were made to influence its decision, but, as has also been done by American, it attempts to obscure their significance by suggesting that petitioners knew or could have known of what was going on and that knowledge that such activities were being engaged in was all of the protection to which the petitioners were entitled. The argument is unsound legally and incorrect factually. It is the act of attempting to bring pressure or influence to bear which is proscribed by all canons of judicial ethics and by all principles and rules of practice. A party does not become free to violate the Board's rules merely by the filing of a notice of intent. The fact that San Francisco publicly announced that it was employing a paid lobbyist to direct a campaign of pressure against the Board (Tr. 5468-70) did little to protect United from the effects of that campaign. Nor did the Chairman of the Board, in his conference with San Francisco city officials, seem to feel that the public announcement by San Francisco of its plans served as any justification for them (Tr. 5468-72).

Equally indefensible is the criticism leveled at petitioners for failure to call to the attention of the Board at an earlier date, the existence of the material contained in the Board's own files, of which the Board admittedly had knowledge and the petitioners did not. It was the Board's own obligation to put a stop to improper conduct of which it had knowledge and that responsibility cannot be shifted by it to innocent parties.

Furthermore, while United has not felt that its knowledge or lack of knowledge of what off-the-record statements were made or information supplied to the Board was a matter of controlling importance, the statement that all of this information was at least available for inspection in a so-called "public correspondence file" is not even remotely accurate. Between November 29, 1957 and April 8, 1959 this file shows that on at least ten occasions enclosures received by the Board were returned to the sender, usually at the sender's request (Tr. 204-7, 209-12, 238-41, 260-1, 266, 569-70, 573-6). On December 5, 1957, for example, a member of the United States House of Representatives wrote as follows:

> "Enclosed is a summary of the facts pointing out the reasons why it is so important that a third nonstop carrier be authorized to handle the route between San Francisco and New York." (Tr. 570)

On June 27, 1958 another letter to the Board from a member of the House reads:

> "Enclosed you will find pertinent information on the San Francisco-New York nonstop case, docket No. 9214." (Tr. 212)

In both instances the material submitted for consideration was returned to the Congressman who forwarded it. United is not suggesting that the Board or any members of Congress attempted to conceal any information which passed between them, but wishes to make it entirely clear that the public correspondence file shows on its face that it by no means discloses all of the *ex parte* information received by the Board which went to the merits of the proceeding.

Neither is it so clear as the Board's brief would imply that communications to the Board received any more than a "routine acknowledgment" and were thereafter ignored. The Vice Chairman's three page reply of July 3, 1958 to a highly critical letter received from a member of Congress hardly falls within the category of a routine acknowledgment (Tr. 209-11). Nor does the legend "COORDINATED WITH BOARD MEMBERS" appearing on the foregoing letter and also upon a later letter, written by the Chairman of the Board under date of July 11 (Tr. 213-4), lend support to the statement that such communications "are rarely ever brought to the attention of any Board member save for signature on the acknowledgment." (Brief, pp. 22-23.)

The statement of position made by the Board in its opinion of November 19, 1959, Order No. E-14664, makes unnecessary any further extended answer to the three-pronged argument or excuse upon which American and San Francisco have been forced to fall back since the time that their improper activities were first exposed: first, that a public correspondence file consisting of only 285 pages does not indicate much of an interest in a case or effort to influence a decision; second, that those letters which relate only to the question of when hearings should be held should be ignored despite the fact that the decision of this question would determine the extent to which evidence would be available of the characteristics and operating costs of jet aircraft; and third, that after all was said and done the content of the correspondence addressed to the Board was of no consequence and could not possibly influence its decision.

The Board has stated its position in these terms:

> "We proceed upon the charges fairly alleged and base our decision upon the nature, rather than the number, of the activities specified, in view of the position of petitioners that further investigation would do no more than provide proof of the allegations or show matters entirely cumulative in nature." (Tr. 5443-4.)

The charges fairly alleged by United are that American and San Francisco improperly sought to sway the judgment of the Board by attempting to bring pressure and influence to bear upon it, both directly in the case of San Francisco and indirectly in the case of both parties through persons prominent in political or public life, and further, that there were improper communications addressed to the Board on the merits of the case. Counsel for United said in his argument to the Board:

> "I have no doubt that a complete investigation of the source of inspiration for this campaign would find that substantially all letters written by members of Congress were written as a result of requests made to them by the interested parties." (Tr. 5373.)

The Board for the purposes of its position is willing to assume that this was so. What the Board in effect has said is that if every member of Congress were persuaded to send *ex parte* communciations to the Board in support of an applicant in a route case, neither the solicitation, the writing, nor the receipt of such communications would invalidate the grant of a certificate.

While the Board, American and San Francisco all argue that the *ex parte* approaches made to the Board were entirely ineffective and harmless, they have been strangely silent on the question of why such intensive and continued efforts were made to produce these approaches. That the pressure which the parties sought to apply and the off-the-record support which was solicited from persons of high political position and influence was intended to have a favorable effect upon American's application cannot be open to any serious question. It remains the position of the Board, nevertheless, that United and TWA, innocent parties, should be required to prove the state of mind of each member who joined in the majority opinion before the Board is required to act. Absent such proof, obviously proof of a character which it would be virtually impossible to obtain, the Board proposes to permit American and San Francisco to retain the fruits of their admittedly improper conduct.

While United does not pretend to be able to state just what considerations flowed through the minds of the members who constituted the Board majority, the unnatural conduct of this proceeding from its very inception itself presents more than a reasonable likelihood that the conduct of American and San Francisco did have the effect intended for it:

The application of American was given preferential treatment and tried out of order.

The Board refused United and TWA access to the staff report which presumably furnished a foundation for the Board's order of expedition. It was unwilling to let the petitioners know what prompted that order and thereby permit them to present facts or argument which might have led to a contrary decision.

The Board majority felt that expedition of the hearing would enable the Board to study the impact of jet aircraft upon routes, traffic and scheduling under circumstances where there would be a minimum amount of other distracting considerations, and directed the Examiner to make specific findings on this issue in determining whether the public convenience and necessity required additional nonstop service (Tr. 136). Yet, when important evidence of actual jet costs became available they refused to reopen the hearing to permit its receipt. They accepted an Examiner's report devoid of specific findings in this admittedly all-important area and predicated their own decision upon this report.

Two of the three members of the Board majority in their grant of a certificate to American departed from views only recently and publicly expressed by them.

They now propose to permit admitted violations of their Principles and Rules of Practice to go not merely unpunished but in fact rewarded.

If such an unusual chain of circumstances culminating in such a decision does not constitute conclusive proof that Board members were influenced by the pressure exerted against them, it certainly suggests at least the strong likelihood that such pressure had its intended effect.

There is much loose talk in opposing briefs of penalizing the citizens of the San Francisco and New York areas through the proposed setting aside of American's certificate, but a dearth of discussion as to what the penalty would be. No one has sought to dispute the statement of United that the withdrawal of American's service would leave for the San Francisco-New York nonstop market the same types of planes, flying at the same times of the day and offering sufficient capacity to fly with reasonable load factors all of the traffic that the Board has estimated that this market will provide.

It is true that San Francisco would be unable to boast of having as many nonstop transcontinental carriers as its arch rival, Los Angeles, and it is true that American would have to give up something which it never had in the first place and might never have obtained but for its own improper conduct. If this be considered a penalty it is a small one to impose for engaging in conduct aimed at depriving United and TWA, through improper means, of revenues in excess of $12,000,000 per year (Tr. 4748).

C. THE ISSUE OF A FAIR HEARING.

On the issue of a fair hearing, little needs to be added to what has heretofore been said by petitioner in this and in its original brief, except to make clear the position in which petitioner has been put by virtue of the refusal of the Board to reopen the record for the receipt of evidence of actual jet costs. Both the Board and American would imply that the evidence which United sought to introduce was speculative, or related to a shakedown period during which costs would not be representative of those which might be ultimately expected. A more complete misrepresentation of United's position could not be made. As examples of the facts which United felt that the Board would wish to have and should have in the record which it was to consider, United has cited the addition of a third pilot to American's flight crew, the addition of a fourth stewardess and the announced intention of American to convert its fleet of 707 aircraft to turbo-fan engines at a cost of 40 million dollars (Tr. 5126-7). These added costs were neither speculative, temporary nor, as the Board argues (Br. 18), such as to not materially alter prior cost estimates.

In addition, United called attention to the fact that the 707 was 30 m.p.h. slower than anticipated, with the result that flight times were substantially increasd (Tr. 5127). While the additional cost attributable to such speed failure may be less easy to fix than the salary of a pilot or the cost of a turbo-fan engine, it is nonetheless an important cost that should have been the subject of investigation.

Granted, as it must be, that hearings must some time come to an end, it is equally true that an administrative agency is not endowed with an unlimited discretion to grant or deny a request to reopen a record. On the contrary, it is well established that where new evidence, not available at the time of hearing, undermines findings on an essential issue, refusals to reopen the proceeding to receive that evidence constitute an abuse of agency discretion. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U.S. 248 (1932); *Braniff Airways, Inc.* v. *C.A.B.,* 79 App. D.C. 341, 147 F.2d 152 (1945); *Enterprise Company* v. *F.C.C.,* 97 App. D.C. 374, 231 F.2d 708 (1955); *cert. den.* 351 U.S. 920 (1956); *W.S. Butterfield Theatres, Inc.* v. *F.C.C.,* 99 App. D.C. 71, 237 F.2d 552 (1956).

In the *Enterprise* case, *supra,* this Court held that the Federal Communications Commission erred in refusing to reopen a proceeding where, during the pendency of petitions for reconsideration of an award made by the Commission, an agreement came to light between the successful applicant and an individual holding interests in other communications media which had a direct bearing on findings made by the Commission. The following statements made by the Court there are especially pertinent here (pp. 378-379):

> "* * * the events in question, though they occurred subsequent to the August order and the petition for reconsideration, struck at the very basis which had been assigned by the Commission for its decision, and were disclosed at a time when the decision was still open for reconsideration. * * *
>
> "The Commission must have latitude in bringing finality to its choice between applicants but the circumstances to which we have referred impel us to conclude that in the public interest the Commission, in the exercise of a sound discretion, should have reopened the record for reception of evidence of the new developments and to complete comparative consideration in light of those developments."

In the present proceeding, as in the case cited, the new evidence as to costs came into existence only after conclusion of the hearing below. The fact that the issue to which the new evidence here relates differs from that considered in the *Enterprise* case makes it no less important to the decision to be made. The Board in the present case did not find that American should be certificated regardless of the economic effects of such certification. It cannot be said, therefore, that the Board would have reached the result which it did reach had it received evidence of added jet costs which showed that the actual costs to be anticipated would be substantially in excess of those estimated at the time of hearing.

The Board seeks to justify its action not only through misstatement of the position taken by United but also by inaccurate description of the cost estimates upon which the Board relies. It describes them as manufacturer's costs made after extensive testing (Br. 15). They were in fact manufacturer's estimates, a far cry from actual costs, and they were made prior to the testing of any planes in passenger service.

Counsel for the Board would also justify the Board's decision by reliance upon data contained in Forms 41 filed by American subsequent to the close of the evidentiary hearings. In preference to evidence subjected to the normal hearing process they would rely upon data which is unexplained, has not been subjected to examination or cross-examination *and has not been referred to or relied upon by the Board in any of its opinions.*

This data was called to the attention of the Board in American's answer to petitions for rehearing and reconsideration (Tr. 5201). It related to operations of the first two quarters of 1959, a shakedown period in the use of jet aircraft which American in an about-face now contends would supply no significant cost information. This data does not cover passenger service costs or ground costs. It shows that experienced "flying operations" and "depreciation" costs were higher than those which it had forecast in this case. Only as regards maintenance expense do these reports show lower costs than American had forecast and this results very largely from a reduction in the size of a reserve account. Maintenance experience over a short term is determined primarily by the manner in which maintenance is scheduled and a reserve account is little more than a bookkeeping figure. Without explanation the foregoing figures are meaningless, particularly in the light of the fact that in the same six-month period TWA reported direct maintenance expense in excess of $240 per ramp hour as opposed to American's reported expense of $158.

United urged that cross-examination was required before any reliance could be placed upon this data (Tr. 5304-6). The Board did not permit cross-examination, but neither did it rely in any way nor even refer to these reported costs in its opinion. That counsel for the Board should find it necessary to support the Board's decision through reliance upon data on which the Board itself did not choose to rely, points in itself to the paucity of the evidence available to support the Board's findings and conclusions.

D. THE FINDINGS AND ORDER OF THE BOARD.

The arguments advanced by Board counsel on pages 40-45 of their brief are little more than a miscellany of unsupported conclusions, misstatement and evasion.

They state that where there is sufficient traffic the Board is entitled to certificate an additional carrier. They do not attempt to explain under what circumstances traffic may be considered sufficient or point to any basic findings supporting a conclusion of such sufficiency.

They state that the San Francisco-New York market is a lucrative market which can support multi-carrier service because other markets of comparable size do so. Not only do they fail to differentiate between the overall San Francisco-New York market, which already has multi-carrier service, and the San Francisco-New York nonstop market which is the market to be considered here, but, with no attempt to analyze the characteristics of what they consider to be comparable markets, they assume that the ability of one to support multi-carrier service is proof of the ability of each.

Counsel state that American's assigned role has long been that of a competitor in the market involved. The fact is that American has never been a competitor in the San Francisco-New York nonstop market. If counsel is speaking of a different market, the one-stop or multi-stop San Francisco-New York market, no reason is advanced why American cannot remain as much of a competitor in those markets with jet planes as it has in the past been with piston-powered equipment.

Counsel state that TWA never matched either the quantity or quality of United's service. As flattering as this statement may be to petitioner, the argument is not meaningful and, more importantly, proves nothing as to the total quantity and quality of service provided for the market. Petitioner would be interested in hearing Board counsel point to any market in which the quantity and quality of service furnished by each carrier exactly matches that of each of its competitors, a situation at which it would be difficult to arrive without an agreement not to compete.

Counsel imply that United and TWA increased their services in 1957 as a result of American's motion for expedition of its application. In view of the undisputed evidence that all new schedules were planned and, in the case of United, announced long before the filing of American's motion, this statement must be characterized as deliberately misleading (Tr. 3214).

Counsel state that United and TWA operated more flights in the Los Angeles-New York than in the San Francisco-New York market, but neglect to point out that the former was and is a much larger market with more passengers to be carried. Counsel's other comparisons between the Los Angeles-New York and San Francisco-New York markets are equally inaccurate or misleading. Except for a limited period in 1957 the record shows that more seats in proportion to the passengers carried were consistently provided in the San Francisco-New York than in the Los Angeles-New York nonstop market (Tr. 3204).

Board counsel find it surprising that petitioners should think of public convenience and necessity in terms of 1960, rather than in terms of some distant and unspecified date. Their position seems to be that if a market may at some indeterminate future time be expected to be large enough to economically support multi-carrier service, the Board is justified in providing multi-carrier service now. This is neither the law nor sound regulatory theory.

This Court, in the case of *Delta Air Lines* v. *Civil Aeronautics Board,* Case No. 14798, slip opinion at p. 9, has provided the short answer to the Board's novel concept of economic sufficiency. The Court said:

> "The public interest * * * requires that, if there be only enough business to support operation by one licensee, there must be only one licensee. This is a commonplace of public utility regulation."

The Board's broad and optimistic conclusion that with a curtailment of the number of schedules which each of the carriers testified was necessary to provide a balanced pattern of service, those carriers should be able to break even in 1960 and do somewhat better thereafter, scarcely satisfies the standard of sufficiency enunciated by this Court.

The position taken by Board counsel with respect to the obligation of the Board to support its general conclusions with specific findings and those findings with specific evidence bears a striking resemblance to the position they take with respect to the obligation of the Board to enforce its Principles and Rules of Practice. They state in substance, at page 46 of their brief, that if the Board is satisfied with the validity of its general conclusions it is not required to support those conclusions with specific findings with respect to the economic effect on a market of added service. In the view of Board counsel the Board does not have to consider what the effect of such new service would be upon underlying costs, load factors, net income, rate of return upon the investment devoted to the market, etcetera. It is the opinion of counsel that if a carrier receives revenue from other sources sufficient to maintain its economic health, the Board need not consider what effect the addition of the new service would have upon either the carriers or the overall services in the market involved.

In the case of *Clarke* v. *United States,* 101 F.Supp. 587 (D.C. D.C., 1951), pp. 590-594, the Court said:

> "Only if there be traffic enough to support efficient operations by more than one carrier does the public interest require the competitive operations of two carriers.
>
> "* * * the property employed must be permitted to earn a reasonable return.
>
> "* * * the ultimate finding of public convenience and necessity must be based upon the proper statutory

> criteria and must have had the necessary factual findings to support it."

Without any explanation of how they would interpret these or other statements made by the Court, counsel state that they are unable to read the decision as imposing any requirement that an agency make findings such as those referred to. Petitioner submits that the Board's attitude towards its obligation to make necessary factual findings fairly supported by the evidence in the record is a further indication that its decision has been influenced by the pressure exerted against it.

E. THE PUBLIC INTEREST.

Counsel profess themselves to be unable to understand what petitioner and the minority members of the Board have had in mind in stating that the probable effect of the entry of American into the San Francisco-New York nonstop market would be to increase general passenger fare levels. The Board majority has never heretofore challenged this statement (nor has American) or claimed any inability to understand the reasoning underlying it.

Stated as briefly as possible, the basis for the foregoing statement is this: the policy of the Board, as is the case with other regulatory agencies, is to fix fares at a level which will enable carriers to earn a reasonable return upon the value of the property devoted by them to the public interest. If American is granted entry into the San Francisco-New York nonstop market, the total investment in the market through duplication of equipment and services will be greater than is or would be the combined investment of only United and TWA and the larger investment will be entitled to earn a larger number of dollars. At present fare levels, however, and assuming the Board's forecasts as to traffic volumes and carrier operations, an anticipated profit for United and TWA in 1960 of more than $1,100,000 would be transformed into what the Board describes as something better than a break-even operation. Certification of American would produce a greater total investment and at the same time cause a reduction in the net income of the three carriers in excess of $1,000,000.

A rate-making case is pending before the Board. The industry is entitled to the same return upon its investment, the same number of dollars of income, whether American is or is not permitted to enter this market. Simple arithmetic makes it clear that if the airline industry is to receive the same return upon its investment regardless of the outcome of the instant proceeding, then the certification of American will call for an increase in passenger fare levels which will provide sufficient revenue after the deduction of all operating costs and taxes to provide additional net income in excess of $1,000,000 per year.

Other users of air transportation should not be called upon to subsidize the San Francisco-New York nonstop market. This is the true public interest, an interest which the Board majority has ignored.

F. THE RELIEF REQUIRED.

The Department of Justice now joins petitioners in urging that the violations of the Board's Principles and Rules of Practice cannot be ignored and that action must be taken to preserve the integrity of the Board's administrative process. The action recommended by the Department is a remand for further hearings. The Department apparently takes no position as to whether American's certificate should or should not be set aside pending determination of what further action should be taken, but states it to be the view of the Department that further hearings would not of necessity require such action.

Analysis of the Board's opinion and order and the brief filed on its behalf in this Court makes it apparent that such relief would be meaningless. The Board has made it entirely clear that regardless of what facts might be divulged in hearings such as those which the Department of Justice has recommended, it would not vacate its order and would not set aside American's certificate. The Board has already accepted for the purposes of its decision the truth of the charges which petitioners have made. Petitioners have charged that American and San Francisco deliberately attempted to exert pressure against the Board and influence the decision or decisions to be made through direct contact with the Board or through solicitation of the *ex parte* approaches which were admittedly made. For the purposes of the Board's decision, it makes no difference whether the president, the board of directors, or lower echelon employees were responsible for the activities in which American engaged. The Board has said that those activities, however initiated and however extensively carried on, were not activities of a nature which in the opinion of the Board would justify the setting aside of American's certificate.

It is further clear that if as a result of approaches made to them by the interested parties every member of every committee in Congress with which the Board had to deal indicated to the Board an off-the-record desire that American be granted a certificate, the Board would not find in such conduct grounds for reversing its position. Petitioners are hopeful that upon further consideration the Department of Justice itself will recognize the futility of the action which it has recommended.

As regards the nature of the relief which is called for here there are significant differences between this proceeding and *Sangamon Valley Television Corp.* v. *United*

States, 103 App. D.C. 13, 269 F. 2d 221 (1959), and related cases in which the Court found that reopening of the proceedings provided adequate relief. Here the Court has already given the Board an opportunity to correct the situation created by the violations of its Rules of Practice. The Board has declined to act and has stated that such knowledge as a further inquiry might elicit would not cause it to change its position. In the case of *Massachusetts Bay Telecasters, Inc.* v. *F.C.C.*, 104 App. D.C. 324, 261 F.2d 55 (1958), this Court in discussing *ex parte* activities said:

> "We should have the benefit of the Commission's determination in such matters before deciding ultimately what disposition should be made of this case."

In the instant case that determination has already been made. The proceeding is now before this Court for final disposition.

The television cases also presented a question of public interest which is not here present. In the television cases the newly authorized service differed from that which was already in existence. Here, as has already been indicated, the service proposed by American is for all practical purposes identical with that already furnished and to be furnished by petitioners, save the fact that the Board calls upon United and TWA to eliminate service that would otherwise be available for the public in order to permit American's entry into the market. Petitioner submits that there is no public interest which could possibly require that American, admittedly guilty of violating the Board's Rules of Practice, should be permitted to divert revenues from petitioners, innocent parties, at a rate in excess of $12,000,000 per year, while the Board conducts further proceedings to consider whether there may be additional evidence of violations of its Rules, which evidence would not alter its decision even if disclosed.

G. CONCLUSION.

Petitioner respectfully urges that the orders under review be reversed and the certificate of public convenience and necessity issued to American vacated.

Respectfully submitted,

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United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 16 1962

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MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15,414, 15,415

UNITED AIR LINES, INC.,
TRANS WORLD AIRLINES, INC.,
PETITIONERS,

v.

CIVIL AERONAUTICS BOARD,
RESPONDENT,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
INTERVENORS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15,414, 15,415

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TRANS WORLD AIRLINES, INC.,
PETITIONERS,

v.

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INTERVENORS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

When this matter was last before the Court, the United States concurred in the Civil Aeronautics Board's defense of its award of nonstop service between New York and San Francisco to American Airlines, with the exception of the issue presented by America's alleged pressure or influence upon the Board. We urged that the Board was under an affirmative duty to ascertain, by further hearing, the extent and effect of American Airlines' violations of the Board's rules. This Court agreed and remanded the proceeding to the Board

"for the limited purpose of holding a hearing to determine, with all convenient speed, the relevant facts on the question of whether the Board's rules were so violated as to require a setting aside of the order."

As amicus curiae in the proceedings on remand, the United States asserted that if American Airlines was found to have violated the Principles of Practice, the Board should set aside the grant of the route and re-evaluate the comparative qualifications of American Airlines and Northwest Airlines, weighing American's violations against it. The Board declined to do so, on the grounds that the terms of this Court's order did not require it and that the violations were not sufficiently grave. It found that the violations were not such as to vitiate the proceeding, to disqualify American Airlines, or to require setting aside the grant of the route to American Airlines. However, the Board met our contentions by its further statements that a comparative re-evaluation would not change the result and that assuming that American were given a "comparative demerit" because of the violations, the Board would adhere to its selection for reasons which it specified.

In the circumstances, we believe that the order below should be affirmed. The actions of American Airlines were fully explored in the hearing on remand. The Board clearly found that American Airlines violated the Board's Principles of Practice by soliciting support from civic bodies, travel agents, the press and members of Congress and instigating communications by them to the Board. As

this Court had directed, the Board then appraised the nature and significance of the violations. It cannot be said that the Board's conclusion to adhere to its award of the route is without adequate support in the record.

Respectfully submitted.

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JULY, 1962

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~~REPLY~~ BRIEF OF PETITIONER TRANS WORLD AIRLINES, INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Nos. 15,414, 15,415.

UNITED AIR LINES, INC.,
TRANS WORLD AIRLINES, INC.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD.

United States Court of Appeals
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IN THE

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CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD.

REPLY BRIEF OF PETITIONER TRANS WORLD AIRLINES, INC.

Supplemental Statement.

There are certain factual allegations in the brief of the Board* herein that need clarification and correction.

The Board states (p. 27)** that the December 2, 1957 conference with officials of San Francisco was not "a private meeting kept secret from the parties." Lest the Court conclude that the parties were on notice of this conference, we point out that TWA learned of it only *after* the event, that no official notice was given even at that time, and that the so-called publication of the transcript mentioned by the Board (p. 4) consisted of permitting interested parties, upon request, to purchase copies of the transcript from the Board's official reporter (Tr. 5466-5482).

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* As in TWA's main brief, the parties are referred to by their commonly used short-form designations.

** References preceded by "p." are to the main briefs of the indicated party.

The Board also states (p. 34, fn.), and American suggests (p. 48) that, in seeking a subpoena for the production of the staff report, TWA did not comply with Rule 19(g) of the Board's Rules of Practice (14 C. F. R. 302.19(g)). The facts are that both at the time of the prehearing conference and at the hearing TWA presented to the Examiner written motions (in lieu of subpoenas) as required by that rule and, in TWA's view, in complete compliance therewith. When the Examiner ruled adversely to the motions, he did not make the moving papers part of the record. It has now been stipulated by interested counsel that these papers shall be reproduced in the joint appendix at Tr. 5483-5486. We consider that the record (Tr. 670-671, 2020-2024) and the matter so stipulated disclose the underlying facts sufficiently to permit the Court to rule upon the question presented.

ARGUMENT.

I.

The Board, American and San Francisco argue for a conclusive presumption of regularity.

The Board repeatedly (pp. 17, 21-28, 30) and American (p. 43) and San Francisco (p. 6), in passing, urge that this Court must accept the Board's declarations that the proceeding below satisfied in all respects the requirements of fairness and the appearances of fairness.[*]

Such a position is clearly unsound. Seldom, if ever, can an agency be expected to come before the Court proclaiming that it has relied upon or has been influenced by incompetent material, or that its proceedings have been otherwise unfair.[**] To terminate the Court's inquiry because of the absence of a confession of error by the agency would in virtually all instances be tantamount to a denial of review. And certainly the Department of Justice does not believe that the scope of review is so restricted (Board's Brief, pp. 52-53).

The fact of the matter is that no such absolute presumption can possibly exist because the Board members are in no position to evaluate the effect the *ex parte* communications have had on their decision. And this would be true even if ex-Member Hector, who cast the decisive vote, had been available to rule upon the issues posed on reconsideration. A very apt observation in this connection is to be found in the recent opinion of Judge Burger in *Community Broadcasting, Inc.* v. *Federal Communications Commission,* ____ App. D. C. ____, ____ F. 2d ____, (Case No. 15,313, decided February 9, 1960). Therein the Commission urged that its grant of temporary authority to one applicant would have no weight in a later comparative hearing for permanent authority. Judge Burger said (Slip Opinion, p. ~~5~~ 8):

> "* * * It is suggested that to question this involves a challenge to the good faith of the Com-

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[*] For example, with respect to the *ex parte* matter in the correspondence file, the Board states (p. 21):

> "The short answer to petitioners' arguments is the Board's disavowal of any consideration of the material."
>
> And again (p. 22):
>
> "* * * Clearly the disclaimer in the instant case is * * * entitled to * * * unreserved acceptance."

[**] The confession of error by the Department of Justice herein and the Board's findings of numerous violations of its principles and rules (Tr. 5445-5449, 5451-5453) may come as close to such a situation as will be presented to this Court.

> mission. But this is not a matter only of good faith. Ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers no matter how sincere their effort or intent. * * * To argue, as appellant does, that this may weigh in the balance of an otherwise close question is not a challenge to the good faith or integrity of the triers; it is a recognition that they are mortal men" [Footnote omitted].

The law is, as might be expected, against any absolute presumption. Express statutory requirements provide that "the court shall review the whole record" and "hold unlawful and set aside agency action, findings and conclusions found to be . . . not in accordance with law . . . contrary to constitutional right . . . [and] without observance of procedure required by law." Administrative Procedure Act, Section 10, 60 Stat. 243, 5 U. S. C. 1010. These are broad powers, to be independently exercised. See *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364, 373. And in that exercise, the presumption of regularity is by no means absolute. See *Clark* v. *United States,* 289 U. S. 1, 14; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 137-138.

In its "review of the whole record" herein and of this point in particular, the Court must be struck by this paradox. Whereas the Board now insists (pp. 21, 26) that all *ex parte* material from members of Congress was "ignored" previously, in its relations with such Congressmen, the Board as a minimum promptly acknowledged the senders' interest and promised to keep them informed of future developments.[*] This is hardly the action of one who intended to ignore another, and we feel sure that it would come as a shock to the interested members of Congress to hear it suggested that their intercession was being ignored.

Alternatively, the Board urges (p. 27) that it may, in any event, assume that public officials will support applications for additional service and that hence the *ex parte* rep-

---

[*] Plainly this technique openly invites the Congressmen to submit further comments on the merits at will. Several did so here.

resentations are weightless and harmless.* This argument completely overlooks hard reality—the fact that active intervention carries with it the message that the matter is of particular concern and that the Congressman is personally interested in it. Such a message vastly outweighs any "normal assumption."

By the same token, reliance by the Board (p. 28) and American (p. 34) on the fact that the bulk of the *ex parte* submissions antedated the order assigning the matter for hearing is wholly misplaced for several reasons:

(1) There is no showing, and could be none, that TWA and United were aware prior to hearing of the *ex parte* correspondence;**

(2) Since all such correspondence, and the oral argument given San Francisco, went to the merits, the fact that some took place at an early stage of the proceeding does not alter their objectionable character.*** It appears unrealistic to suggest that the Board would at later stages forget the "correspondence barrage" (Tr. 5457) that attended the early phases of the proceeding.

(3) Even assuming *arguendo* that the sole effect of the *ex parte* matter was to affect the Board's order expediting the proceeding, that order is made subject to review

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* A different appraisal of the weight to be given Congressional views is indicated in the record, when the Chairman observed at oral argument (Tr. 4529-4530):

> "Congressman Dorn, I want to assure you that in so far as the presence of members of Congress is concerned, the Board has always welcomed this representation of this kind as being representative, truly representative of the expressed will of the people from the constituencies they represent. We are very glad to have all the members of Congress that are herr [sic] today."

** TWA and United were aware of the oral argument given San Francisco and promptly urged the Board to afford them equal opportunity for oral argument. The Board ruled against TWA and United (Tr. 641).

*** In *Sangamon Valley Television Corp.* v. *United States*, 103 App. D. C. 13, 269 F. 2d 221, the offensive communications occurred before any licensing proceeding was initiated.

herein by Section 10(c) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1010(c). Arbitrary action in assigning the proceeding is as fatal to the Board's final order as is arbitrary action in any other connection. *United Detroit Theatres Corporation* v. *Federal Communications Commission*, 85 App. D. C. 239, 241, 178 F. 2d 700, 702.*

(4) The Board itself ruled (Tr. 5443) that its Principles of Practice were applicable at the time of all these submissions and that the Principles were violated thereby. It is also clear that the Board's Rules were applicable at that time. American relied thereon in filing its motion (Tr. 6), San Francisco in answering in support thereof (Tr. 24), and the Board in extending TWA's and United's time to answer (Tr. 22).

II.

The Board continues to ignore Section 3 of the Administrative Procedure Act.

The Board emphasizes, rather than denies, its disregard of the requirements of Section 3 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1003, discussed in TWA's main brief (p. 20). It states (p. 27) that it "frequently meets with city representatives to discuss the air transportation problems and needs of their cities." It does not state, however, and we do not believe that it would state, that it engages in such practice where, as here, the merits of contested motions in pending adversary proceedings are involved. But, beyond this, the Board has never suggested, in the form of a rule or otherwise, that it employs informal meeting procedures with cities interested in new route proceedings.**

---

* Similarly, in urging that TWA was not entitled to production of the staff report, the Board (p. 34) and American (p. 44) improperly assume that TWA was barred from any effort to show that the order expediting the proceeding was arbitrary.

** In the circumstances here, it is unthinkable that any such rule, appropriately challenged, would survive the scrutiny of an appellate court.

Also, the Board fails to cite any precedent to support its granting oral argument to a city interested in a pending case and then denying the seasonable requests of adversely affected carriers, TWA and United, for an equal opportunity. Had those requests been granted, it might be urged with some logic that the absence of a rule prejudiced no one. But certainly, having refused equal treatment, the Board is in no position to urge that no prejudice flowed from a denial of the valuable right of oral presentation. *Londoner* v. *Denver,* 210 U. S. 373.

Similarly, the Board urges (p. 20) that it has "developed a long-established method of handling" *ex parte* submissions on the merits (commingling them with all other correspondence in a non-record file). This is described (p. 24) as an "administratively devised" procedure. It is conceded (p. 25) that "it would be more desirable to have an explicit statutory provision or rule delineating this practice."

"More desirable" is certainly an understatement. Administrative practices of general application are invalid unless published. That much is evident not only from the unequivocal text of Section 3* but also from its entire legislative history. For example, the Report of the Senate Committee on the Judiciary on S. 7 (Report No. 752, 79th Congress, 1st Session) stated:

> "The public information requirements of Section 3 are in many ways among the most important, far-reaching and useful provisions of the bill. For the information and protection of the public, wherever located, these provisions require agencies to take the mystery out of administrative procedure by stating it."

Not only the Board's rules, but indeed its decisions, policy statements, etc., can be searched in vain for any indication of the existence of the "long-established procedures" alleged here. To extend a presumption of regularity to instances where an agency has so thoroughly disregarded the plain mandate of Congress is completely unwarranted.

---

* "Every agency shall separately state and currently publish in the Federal Register * * * statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available. * * * No person shall in any manner be required to resort to organization or procedure not so published."

III.

The Board continues improperly to treat the proceeding below as an enforcement case.

The Board argues (p. 30) that, since the Board "was rather plainly not disqualified", the proceeding below must be considered fair. Since it was fair, the argument runs, the only remaining issue is whether a penalty should be exacted for violations of the rules.* Hence the issues are treated in the nature of an enforcement case, allegedly subject to the broad discretion vested in the agency under the Supreme Court's holding in *Federal Communication Commission* v. *WOKO,* 346 U. S. 86.

This reasoning is defective for several reasons. In the first place there is no warrant for requiring disqualification of the Board as a condition precedent to a finding of an unfair hearing. Cases are being reversed or remanded to agencies regularly for lack of fair hearing without involving disqualification of agency members. Thus, the *Morgan* case was twice reversed because of lack of fair hearing (*Morgan* v. *United States,* 298 U. S. 468; 304 U. S. 1). Eventually, however, the Secretary of Agriculture's decision was upheld (*United States* v. *Morgan,* 313 U. S. 409).

Secondly, disqualification of the Board (because of its exposure to the copious *ex parte* matter revealed here) would result in an impossible situation. The entire Board was subjected to such material, and the rule of necessity precludes the jurisdictional vacuum that would be created by disqualification of the entire agency.*

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* Significantly, the Board fails to address itself to the query suggested in our main brief (p. 25) to this effect: Since rules are the safeguards of fairness, how does fairness survive when rules perish, either because of the neglect of nonobservance or the congenital defects of uncertainty and ambiguity? (Tr. 5440-5441).

Finally, where, as here, the agency result is infected with incompetent material, substantial violations and widespread disregard of its own rules and regulations and the other substantial legal errors urged in our main brief, the issue of sanctions becomes secondary. Since no such result can be permitted to survive appellate review, the issue of fault of particular parties need not be considered.**

IV.

Ex-Member Hector's participation in the decision is not justified by the *Sisto* or *McGraw* cases.

In this case the Board on two occasions ruled that it would *hear* oral argument (Tr. 4245, 4506).*** It thus ruled out its alternative under the statute of receiving argument. But in *Sisto* v. *Civil Aeronautics Board*, 86 App. D. C. 31, 179 F. 2d 47, the latter alternative was expressly reserved. At the very outset of the oral argument before the Board (Acting Chairman Ryan and Member Russell Adams attending), the Acting Chairman stated (with no objection raised):

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* Noting the similar situation in *Sangamon Valley Television Corporation* v. *United States*, 103 App. D. C. 13, 269 F. 2d 221, the brief of the Department of Justice therein (pp. 11-12) urged that the proceeding be retried *in toto*.

** Perhaps the law has become clouded by such cases as *WKAT, Inc.* v. *Federal Communications Commission*, 103 App. D. C. 324, 258 F. 2d 418. Therein the public interest findings for operations by some applicant antedated the proceeding. Hence the only possible curative action for the defective procedure lay in sanctions against the party responsible. But here, as in *Sangamon*, the public interest findings are inextricably interwoven with the legal errors complained of, and the appropriate remedy is to reverse the Board's order.

*** As noted in our main brief (p. 30) this amounted to an *ad hoc* ruling in this case just as the cut-off rule announced by the F. C. C. in *Sangamon* was so considered by the Court.

> "I may say, gentlemen, that two of the members are unavoidably absent this morning, but the transcript will be made available to them. Their participation will be upon the basis of their reading and digesting the transcript of oral argument today." (Transcript of Oral Argument in *T. P. Wright, Administrator, C. A. A.* v. *Charles R. Sisto,* Docket No. SR—1987, July 12, 1948).

Similarly, in *McGraw Electric Co.* v. *United States,* 120 F. Supp. 354, the procedure being followed was specifically made known to the parties, and no timely objection was taken thereto (at p. 357).

Thus these cases are authority against, rather than for, the Board's argument that, without notice to the parties, it may abrogate its ruling to hear argument by permitting an absent member to cast the decisive vote.

V.

The procedure suggested by the Department of Justice falls short of protecting TWA's rights.

The confession of error by the Department of Justice (Board's Brief, pp. 52-53) is, in TWA's view, appropriate, but neither it nor the curative procedure the Department suggests goes far enough. It is appreciated that the interests of the Department extend primarily to the protection of the over-all administrative process. But "conflicting private claims to a valuable privilege" are equally cognizable on review by the Court. *Sangamon Valley Television Corp.* v. *United States,* 103 App. D. C. 13, 16, 269 F. 2d 221, 224.

It is the Department's suggestion (Board's Brief, p. 53) that, while further proceedings are held to vindicate the administrative process and to reanalyze the defective result below, that result should be permitted to continue *de facto.* Such action, however, would represent a failure by the Court to "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364, 373; cf. *Blue Gem Dresses, Inc.* v. *Fashion Originators Guild of America, Inc.,* 116 F. 2d 142.

The impelling equities weighing against any such course may be summarized as follows:

(1) Under the Board's findings (Tr. 4748), TWA and United have, to the date of this brief, suffered a deprivation of revenues of over $4,000,000. That figure will increase by $1,000,000 per month during the further period required for review.*

(2) The history of proceedings remanded by this Court to the Board, even on simple issues, suggests that at least 18 months would elapse before the Court would again exercise jurisdiction.** During any such period some $19,000,000 additional revenues would be diverted.

(3) The Board's findings herein (Tr. 4743) affirmatively indicate that no deprivation of service to the public would result in the absence of American's authorization.

(4) Throughout the proceeding, TWA and United diligently sought to bring to the Board's attention the legal errors discussed in our main brief.

(5) "The equitable principles governing judicial action" include most prominently the maxim that no person shall profit from his own wrong—a maxim most appropriate here. This is particularly true since, without American's operation, the interests of the public are amply protected.

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* Certainly no losses of this magnitude could conceivably accrue to a disappointed applicant for a television station. Hence the procedures followed in *Sangamon* are inappropriate here.

** See *Northwest Airlines, Inc.* v. *Civil Aeronautics Board,* 90 App. D. C. 158, 194 F. 2d 339, remanded in January, 1952 for comparative hearing on a single issue. The first final order in the resultant proceeding (*Cleveland-New York Nonstop Service*) followed on April 23, 1954 (18 C. A. B. 586) with other issues deferred until September 1, 1955 (20 C. A. B. 760).

Conclusion.

The orders under review should be set aside.

Respectfully submitted,

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March 1, 1960

REPLY BRIEF OF PETITIONER
UNITED AIR LINES, INC.

In The

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15414

UNITED AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC., CITY AND
COUNTY OF SAN FRANCISCO,
Intervenors.

On Report of the Civil Aeronautics Board
Following Remand

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In The

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Intervenors.

**On Report of the Civil Aeronautics Board
Following Remand**

I.

INTRODUCTION

American and San Francisco have violated the Principles of Practice of the Civil Aeronautics Board. The fact is beyond dispute. Respondent, in its brief (p. 16), candidly states that "the Board held that American and San Francisco had conducted campaigns intended to generate 'extra-record influence and pressures on the Board,' and so had violated Section 2(c)" of those Board rules. In its opinion (Tr. 10304),* the Board itself describes those campaigns as having been "purposefully undertaken." Even the intervenors' briefs here are in the nature of pleas of avoidance —advancing inadequate excuses for their conduct, as will be shown.*

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* "Tr." refers to the supplemental joint appendix to the instant Briefs. "J.A." refers to the prior joint appendix in this proceeding.

The question before the Court, therefore, is what action should be taken in the light of these purposeful violations. United submits, as it has in its main brief, that there should be a recision of the award to American and a completely fresh start before the Board on the question of New York-San Francisco nonstop service. This Court in a series of recent decisions has insisted that the integrity of the administrative process is of paramount importance and must be maintained free from the taint of off-the-record pressures designed to influence agency decisions. United's suggestion implements that purpose. Respondent's and intervenors' proposal will not do so. Indeed, respondent's argument that the Board's decision to do nothing is reasonable —thus rewarding American for its violations and penalizing innocent parties deprived of a fair hearing—offends basic principles of our jurisprudence.

II.

RESPONDENT AND INTERVENORS CANNOT ESCAPE THE FORCE AND EFFECT OF RECENT JUDICIAL PRECEDENTS WHICH WARRANT RECISION OF THE AWARD TO AMERICAN.

A. The Principles of the *WKAT* and *Sangamon* Cases Apply to the Present Proceeding.

Petitioner, in its brief, maintained, as it still does, that recent decisions of this Court in *WKAT, Inc.* v. *FCC,*

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*United does not propose to discuss errors and omissions in intervenors' counterstatements of the case. The evidentiary facts, summarized in United's main brief, are fully set forth in the Board's opinion on remand, to which the Court is respectfully referred.

.. U.S. App. D.C. .., 296 F.2d 375 (1961) and *Sangamon Valley Television Corp.* v. *United States*, ... U.S. App. D.C. ..., 294 F.2d 742 (1961), warrant recision of the award to American. Respondent and intervenors, recognizing the force of these precedents, endeavor unsuccessfully to sidestep their effect. Respondent finds an invalid point of distinction in that corrupt tampering with the adjudicatory process was present in the *WKAT* case. Although no such claim is made with respect to the *Sangamon* case, respondent argues that the facts differ from those here. That *Sangamon* and the present case are closely similar is shown in petitioner's main brief (p. 19). Moreover, this Court in its prior decision in the instant proceeding (105 U.S. App. D.C. 220, 281 F.2d 53) was of the opinion that the factual differences which did exist did not preclude application here of principles enunciated in the *Sangamon* case (281 F.2d at 58).

American's argument (Brief, p. 27) that *Sangamon* dealt with secret submissions of factual matter to the Communications Commission, whereas the *ex parte* communications here related to matters examined at the hearing, proves that American and San Francisco solicited individuals prominent in civic and political affairs to communicate with the Board only in the hope and with the expectation that the very stature of those individuals would influence the Board's decisions. So also, American's attempt to distinguish the *Sangamon* case on the ground that the submissions there were made by a party is without significance. It is highly improbable that *ex parte* communications by private applicants begin to possess the pressure potentials inherent in repeated off-the-record submissions on the merits (even assuming they relate to matters otherwise dealt with in the proceeding) by some 25 civic groups, more than 36 members of the Congress, a White House assistant, a governor, a lieutenant governor and others, as was the actual situation here.

B. Off-The-Record Pressures Brought to Bear on the Board Precluded a Fair Hearing.

Respondent's and intervenors' answers to petitioner's showing that it was denied a fair hearing are untenable. Notwithstanding respondent's assertion that the fair hearing issue has already been decided, the fact is that this Court in its prior opinion in this case explicitly stated that it was not then expressing any views as to either the existence or the effect of then alleged violations of the Board's Principles of Practice, but noted that "If, on the limited remand which is to be ordered, the objections of petitioners are sustained, of course, the entire matter will have to be reopened * * *." (281 F.2d at 55)[*]

Although respondent points out that the Board stated that its decisions had not been influenced by the improper activities of American and San Francisco and argues that "administrative disclaimers of consideration of matters outside the record are accepted by the courts" (Br. p. 29), not one of respondent's cited cases is even remotely similar to the present case. None of them dealt with a situation involving off-the-record pressure campaigns.

Respondent's effort to brush aside the element of unconscious influence by urging that the matter is speculative, likewise, is without merit.[**] As a practical matter, even proof of conscious influence is normally impossible. A review of the finding in Examiner Stern's Initial Decision in the *WKAT* case on remand shows that Commissioner Mack was under such heavy pressure from two opposing sides and that it was probable that the efforts of one cancelled the other. Nevertheless, the guilty parties there were disqualified, not because they succeeded, but because of their attempt to bring pressure on a member of the agency. In any event, neither the *WKAT* nor the *Sangamon* case insists that a party claiming prejudice must assume the insurmountable burden of trying to prove that a member of an administrative agency had been unconsciously influenced by improper pressures during the course of a proceeding. On the contrary, the Court in the *WKAT* case makes it perfectly clear that purposeful and intentional attempts to bring off-the-record pressures to bear on an agency are in themselves improper (296 F.2d at 383).

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[*] San Francisco apparently argues that petitioner had actual knowledge of the nature and source of the *ex parte* communications flowing in upon the Board throughout the proceeding. This claim is directly contrary to the Board's findings and overlooks the fact that the extensive proceedings on remand were necessary to determine who solicited, inspired and authored those documents.

[**] *Shaughnessy* v. *Accardi*, 349 U.S. 280 (1955), cited by respondent, does not support respondent's contention that "assertions of

C. No Valid Excuse Exists For the Violations That Occurred.

Equally invalid are respondent's and intervenors' arguments designed to mitigate the consequences of American's and San Francisco's violations of the Board's Principles of Practice, i.e., their arguments that the majority of the

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unconscious influence are purely speculative and of no legal moment." That case merely held that where the alleged source of pressure had not been proved to be in existence or to have come to the attention of members of the agency, a finding that there had been subconscious psychological pressure could not be sustained. By contrast, the proof lacking there, has been made here. The record in the present case unequivocally establishes the existence of numerous off-the-record communications; it establishes that all of those improper communications were sent to the Board or one or more of its members; it establishes that all of them were acknowledged by various Board members; and it further establishes that in various instances the acknowledgments bear the notation "Coordinated with Board members." (See J.A. 101, 103, 104, 105, 108, 110, 116, 117, 118, 120, 124, 145, 147, 347, 348-9, 350, 355, 357.)

objectionable contacts with the Board occurred before the case was set for hearing and that, in view of alleged ambiguities in the Principles of Practice, American and San Francisco could have reasonably construed those Principles as not applying to off-the-record pressures brought prior to the notice of hearing. In the first place, respondent in its brief (p. 27) admits that the number of violations occurring at any particular stage of the case is of no significance. And the inescapable fact is that the Board found that American and San Francisco both violated its Principles of Practice not only after notice of hearing but also during still later stages of the case (Tr. 10288, 10295).

Secondly, there was nothing ambiguous about the applicability of the Principles of Practice to attempts to bring off-the-record pressures to bear upon the Board. Those Principles simply restated well known canons of judicial ethics. Neither respondent nor intervenors suggest that extra-record attempts to influence a court would be tolerated, irrespective of whether they occurred before or after a case was set for hearing. Without reference to formal rules of any kind, this Court has held that off-the-record efforts to influence decisions of administrative agencies are improper and cannot be condoned. *WKAT Inc.* v. *FCC*, ... U.S. App. D.C. ..., 296 F.2d 375 (1961); *Sangamon Valley Television Corp.* v. *United States*, ... U.S. App. D.C. ..., 294 F.2d 742 (1961).

Thirdly, intervenors attempted rationalization of their claimed interpretation of the Principles of Practice is wholly unpersuasive. At the outset, it is perfectly obvious that off-the-record efforts to influence agency decisions on the merits of a proceeding are just as objectionable when made before notice of hearing as they are when made after notice of hearing. No amount of procedural hair splitting can affect this conclusion. Indeed, this Court in the *Sanga-*

mon case drew absolutely no distinction between off-the-record contacts with the Federal Communications Commission which occurred, not only prior to notice of hearing but prior to institution of the proceeding, and similar contacts made after the case had been started.

Moreover, and despite intervenors' arguments to the contrary, the record is perfectly clear that the bulk of the extra-record communications throughout the proceeding below—both before and after notice of hearing—were not confined to mere procedural matters but also expressed arguments as to either or both of the central issues in the case, namely, the alleged need for a third carrier and the carrier to be selected to provide the service. For example, chamber of commerce resolutions submitted *ex parte* to the Board in May 1957 and prepared by American, or following a form furnished by it, repeatedly urged that New York-San Francisco service was "inadequate and inferior * * * and that a third nonstop air carrier between the San Francisco Bay area and New York is required" (J.A. 82-83, 250, 286, 317, 369; Tr. 10346). The same is true of *ex parte* communications to the Board during the same period from members of Congress whom American in its brief admits to have contacted (American's brief, p. 10; J.A. 277, 288, 329-30, 340-41, 348-9, 355, 357-8, 363, 365).

Over and beyond this, the facts of this case remove any basis for intervenors' claimed good faith interpretation of the Principles of Practice. As early as July 11, 1957—approximately two months after the filing of American's motion for expedition and more than nine months before the proceeding was set for hearing—the Chairman of the Board in no uncertain terms advised San Francisco that the case was governed by the Board's rules and admonished the City as to the impropriety of *ex parte* communications (J.A. 378). American was fully aware of that admonition, having received a copy of the City's reply to the Board with respect to it (J.A. 381). Furthermore, on December 2, 1957, the occasion of San Francisco's *ex parte* conference with the Board—and still four months before the case was set for hearing—the Chairman again admonished the City respecting the impropriety of off-the-record efforts to pressure the Board (J.A. 973). American has never denied familiarity with the matters transpiring at the conference. Thus, within but a short time after the filing of American's motion, both American and San Francisco were fully aware of the Board interpretation of its Principles of Practice—the only interpretation consistent with the basic requirements of fairness and due process in adjudicatory proceedings.*

Neither the Federal Aviation Act, treatises or other matters cited by respondent and intervenors supports intervenors' claimed interpretation of the Principles of Practice. Intervenors' reliance on Sections 401(c) and 401(g) of the Federal Aviation Act (49 U.S.C. § 1371(c), § 1371(g)) is misplaced. While those Sections provide that interested persons may file protests or memoranda in support of or opposition to the issuance of certificates or amendments of certificates of public convenience and necessity, they do not, and could not, repeal existing ethical concepts and give applicants an untrammeled right to embark upon campaigns designed to influence Board decisions through extra-record activities. From all that appears, in Gellhorn "Administrative Procedure Reform: Hardy Perennial," 48

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* These same considerations also dispose of intervenors' arguments that the filing of an application with the Board does not begin a proceeding, that there is no case or parties until the application is noticed for hearing and, until that event occurs, no obligation exists to serve anyone with copies of communications addressed to the Board.

A.B.A.J. 243, 244 (1962), cited by respondent and intervenors, the author, in commenting on the present case, must have been wholly unaware of the facts developed on remand here, i.e., that the barrage of off-the-record communications involved was generated by American and San Francisco as part of their campaign to bring political and other pressures to bear upon the Board. The excerpt from Dean Landis' "Report on Regulatory Agencies to the President Elect" (1960) quoted in respondent's brief (p. 36) has nothing to do with the subject of *ex parte* presentations under existing agency procedures but relates only to drastically changed procedures suggested in that Report. Drafts of legislation proposed but not enacted, also cited by respondent and intervenors, obviously establish no policy and, of course, could be substantially altered before enactment if, indeed, they are enacted at all.

Also to be rejected is American's final argument that it be permitted to continue operating New York-San Francisco nonstop service in the event of reversal of the orders under review. This again is but a plea by American to be rewarded for its violations of the Board's rules. No justification for so doing exists. On the contrary, data offered in United's main brief which are not disputed and which American would like to have ignored, demonstrate that discontinuance of American's service will not adversely affect the public in any respect.

III.

CONCLUSION

The orders of the Civil Aeronautics Board under review and the certificate of public convenience and necessity issued to American Airlines, Inc., pursuant thereto, therefore, should be set aside and the case remanded to the Board with instructions to conduct an entirely new proceeding on the issue of New York-San Francisco nonstop service.

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REPLY BRIEF OF PETITIONER TRANS WORLD AIRLINES, INC.

IN THE

United States Court of Appeals

For the District of Columbia Circuit.

Nos. 15,414, 15,415

UNITED AIR LINES, INC.,
TRANS WORLD AIRLINES, INC.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD.

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ON PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD.

REPLY BRIEF OF PETITIONER TRANS WORLD AIRLINES, INC.

SUPPLEMENTAL STATEMENT.

There are certain factual allegations of Respondent and the Intervenors that require comment, clarification or correction.

American states there is absolutely no evidence tying it in with any of the extra-record activities after the Board set its application down for hearing, "other than the concededly proper Congressional statements in lieu of argument" (American Brief, p. 21). This statement is wholly inaccurate.

In the first place, TWA has conceded nothing. As indicated in its main brief, TWA contends that American's solicitation of Congressmen is objectionable because of the indirect and undercover methods adopted, and further objectionable as a part of its overall campaign to bring pressure to bear on the Board and influence its decision. As such, American's solicitation of Congressmen is just another instance of its actions to subvert the procedures of the Board for illegal purposes. Secondly, there were several *ex parte* communications to the Board from Congressmen during the course of the hearing which had no relation to the oral argument and which the record clearly indicates were instigated by the Intervenors (TWA Brief, p. 14). Thirdly, there were other extra-record activities during the course of the hearing that American took credit for (TWA Brief, p. 13; Tr. 8987-8989).

The Board argues that American is not responsible for San Francisco's activities because it did not control or dictate its actions (Board Brief, p. 27), and San Francisco asserts that it at all times acted independently (San Francisco Brief, pp. 14, 36). TWA does not contend that American dictated San Francisco's actions but that it instigated and encouraged such action and the two parties acted in concert to commit certain acts which violated the Rules and Principles of the Board. The record in this case reveals a pattern of action characterized by stimulation on the part of American followed by action on the part of San Francisco and complete collaboration on a common course of action and coordination of effort, rather than occasional conferences to exchange views and information.* American, not

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* Mr. Strickler testified: "I worked very closely with the City Attorney's office. I had many discussions with that office. I would make suggestions to the City Attorney. He would make requests of me. I would try to fulfill these requests." (Tr. 5908-5910). See Strickler's letter to Miller (San Francisco Chamber of Commerce) commenting on that group's Exhibits to be filed with the Board (Tr. 9082-9086).

Mr. Martin testified: "American furnished us with a lot of data that we used . . ." (Tr. 7388) . . . "I am certain that we may have drafted the letters together . . ." (Tr. 7392) . . . ". . . Mr.

San Francisco, originated the idea of filing a motion for expedited hearing on American's application for a third New York-San Francisco nonstop service. American, not San Francisco, suggested the *ex parte* oral argument on the merits of its motion, and briefed the representatives of San Francisco on how to present American's (and San Francisco's) case (TWA Brief, p. 32; Tr. 6132, 6177-6185, 10,291). American concedes that it drafted many resolutions and documents used by San Francisco (Tr. 7542) and, as previously noted, San Francisco followed courses of action suggested by American. Under the law of joint responsibility of conspirators, that showing is more than sufficient to hold American and San Francisco jointly responsible for the actions of each other.

Typical of American's tortuous use of the facts is its assertion that, in connection with its press activities, American's "handouts" were prepared because ". . . the local public relations man for American in San Francisco was constantly badgered by inquiries from newsmen about the case" (American Brief, p. 41). In fact, just the reverse was the case. The memos to the editors were drafted prior to the time American had received inquiries concerning the case and it was the memos that stirred up the badgering, which was what they were intended to do* (Tr. 6818-6822).

Strickler came to my office and we developed this list together . . ." (Tr. 7398) . . . ". . . I thought he [Strickler] was working for me . . ." (Tr. 7410) . . . "[At the Bohemian Club luncheon] . . . I undoubtedly discussed the matter with him [C. R. Smith] as to where we thought we stood. We talked about what we could do, and I undoubtedly thanked him for letting Charlie Strickler do some of our bird dog work for us, and I think this was the general discussion at the table" (Tr. 7435).

* Mr. Barbour, American's press relations official in San Francisco, testified: ". . . I would get up those memos to anticipate the need for this information before I would get the calls . . ." (Tr. 6822); * * * "The results were exactly as I had anticipated. There was interest in it. The response on the part of the press and other people was immediate and emphatic" (Tr. 6818).

A further example of exceptionally imaginative use of the record by American is its description of one of the "get-togethers" held in June 1958 to "improve American's traffic position." (American Brief, p. 18). This luncheon was attended by certain American

Finally, American's assertion that it has been "overwhelmingly" established that petitioners had "direct knowledge" of the *ex parte* communications and were "fully on notice of them from the outset" is completely unjustified and totally unsupported by the record (American Brief, p. 13). TWA has, throughout the record, stated that it had no actual knowledge of this activity or the extent of it, and there is nothing in the Board's Rules or Principles which charges it with such knowledge simply because some of the communications were placed in the so-called public correspondence file.

ARGUMENT.

I.

The unsupported allegations of American and San Francisco as to established practices before the Board do not excuse violations by these parties of the Board's Rules and Principles.

American and San Francisco urge in their briefs, in varying degrees, that ". . . nothing done by the City or American differed in any important particular from what has been done by cities and carriers for years in cases like this . . ." (American Brief, p. 3; San Francisco Brief, pp.

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representatives, the President of the Downtown Association, representatives of the City Attorney's office, the Publisher of the *Call Bulletin* and an editorial writer for the *Chronicle* and two other persons. It is doubtful that representatives of the City Attorney's office normally attend luncheons to discuss the general "traffic position" of an airline. It is just as unlikely that the guests "happened to" include newspapermen. And even more incredulous is American's explanation of a regional vice-president's description of two critical editorials (Tr. 8987). Mr. Bone testified that at the luncheon: "We expressed our disappointment" and ". . . there was much discussion about that [the postponement] all with high indignation on the part of the good citizens of San Francisco" (Tr. 6612). American's statement, therefore, that nothing was said at the luncheon by American officials on which the editorials were based is hardly grounded on "undisputed evidence." (American Brief, p. 18).

19-20). American further alleges, *with no citations to the record or specifications as to what authority it relies on for its propositions,* that the Board, in considering activation of route cases, has always acted in a "wholly informal manner" (American Brief, p. 27), a manner which, we hasten to add, would, if true, leave interested carriers in new route proceedings completely at the mercy of decisions reached through "discussions with the CAB and the staff" by carriers, "conferences" with civic representatives, "state officials and Congressmen . . . [urging] action by the CAB, both in oral and in written communications" (American Brief, p. 29).

This is a wholly gratuitous and tenuous argument in behalf of American. There is nothing whatever in the record to support American's description of past activities and practices of the Board, carriers and other interested parties in new route matters. Furthermore, if such a description is correct, and such "informal" activities have occurred, the parties participating in such activities have violated the Board's Rules and Principles, and such violations hardly form a sound legal basis for supporting the activities of American and San Francisco in question in this case. The mere fact that a party customarily committed illegal acts in the past without being apprehended does not convert the illegal acts into an established legal rule.

It is axiomatic in a government of laws that an illegal act may not be excused by allegations or proof of similar unpunished violations by others or by the same person. And it is highly significant that the Board, while mentioning the fact that the Examiner sought to excuse the violations established here on these grounds, refused to base its decision on such extra-record and illegal grounds stating that ". . . the record here discloses only the activities of American and San Francisco and not that of other parties in other proceedings" (Tr. 10,300, n. 64). TWA submits that the same considerations bar this Court from considering these allegations in mitigation of the offenses revealed by the reopened record in this remanded proceeding.

In any event, the facts of this case set it apart from the "ordinary" case with which it is attempted to be equated. It is not alleged, nor could it be, that ordinary cases always start with a motion to grant expeditious treatment to a new route application recently denied by the Board in a hotly-contested adversary proceeding. Such was the case here, and thus this proceeding from the date of the filing of the motion in May 1957 was highly controversial and adversary in nature. For, if granted, the Board's action was tantamount to a finding that a *prima facie* case had been established on the merits. TWA and United would obviously be aggrieved by such a finding and thus this proceeding was clearly adversary from the outset. Futhermore, as pointed out in TWA's brief, the Board gave notice that its Rules of Practice applied to the proceedings in connection with the motion, and certain actions of the Intervenors established that they likewise recognized the adversary nature of the case* (TWA Brief, p. 20).

Also, other allegedly common practices bear no resemblance to the facts of this case. The mere fact, for example, that the Board has purportedly held conferences with other civic officials as to the general transportation needs of their communities does not cure the vice of the *ex parte* oral argument in this case. For it has not, and could not, be shown, that in those instances the conference was, as here, an integral part of an organized pressure campaign and was used as a forum for arguing the merits on the application of an individual air carrier for a specific route authority.

American argues that, even if the CAB reached a "conclusion" based on communications it received prior to January 1958 in support of American's application, as a matter of law, petitioners were not denied due process of law (American Brief, p. 25). The *Cement Institute* and *Morgan* cases cited by American in support of such a proposition, however, are clearly inapposite. The *Cement* case involved the question of the propriety of the FCC in failing to disqualify itself in a case involving a multiple basing point price system. Long before the filing of the complaint in the case, several members of the FCC, following an official investigation of that body, reported to Congress that such a system violated the Sherman Act. There was no question raised in the case of *ex parte* influence and the Commission's opinion as expressed to Congress was the result of a thorough, complete investigation (333 U. S. 683, 700). The *Morgan* case holds that cabinet officers may approach a specific case with an "underlying philosophy" without being said to have prejudged a case (313 U. S. 409, 421). In any event, the *ex parte* influences and pressure tactics in the instant case were not limited to any particular stage of the proceeding but were persisted in, and subjected the Board to extra-record influences, throughout all phases of the case.

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* For these same reasons, the arguments of the Respondent and the Intervenors that there were no parties until the case was set for hearing are not persuasive.

II.

Sections 401 (c) and (g) are ineffective to sanction the illegal extra-record activities in this case.

American attempts to make much of Sections 401 (c) and (g) of the Act and the alleged Board practice of implementing these provisions by placing all communications submitted pursuant to such provisions in a so-called "public correspondence file" of the docket involved (American Brief, p. 35). American argues from this that all communications were legally sanctioned and their inclusion in the correspondence file made them public and unobjectionable.

The short answer to this argument is that nothing in these Sections sanctions pressure tactics or extra-record activities designed to influence the Board's decision.

Another fatal defect in this argument is that, even if the Board did in fact adopt as a practice or procedure the indicated method of implementing the provisions of Sections 401 (c) and (g), it was a secret procedure and, therefore, useless for the purpose urged by American.

It is significant that the Board has largely discarded this ground as a defense for its action (Board Brief, p. 25). Undoubtedly this is due to the fact that this argument flies in the face of the express provisions of Section 3 of the Administrative Procedure Act.* Under that Section, administrative practices of general application are invalid unless published. That much is evident not only from the plain text of Section 3, but also from its legislative history. For example, the Report of the Senate Committee on the Judiciary on S. 7 (Report No. 752, 79th Congress, 1st Session) stated:

> "The public information requirements of Section 3 are in many ways among the most important, far-reaching and useful provisions of the bill. For the information and protection of the public, wherever located, these provisions require agencies to take the mystery out of administrative procedure by stating it."

Not only the Board's rules, but indeed its decisions, policy statements and announcements can be searched in vain for any indication of the existence of the "long-established procedures" allegedly existing here. It is perfectly futile for the Intervenors now to argue that the extra-record activities in this case were sanctioned by statutory provisions which have never been implemented in a legal manner. Also the implication American seeks to create that this was a widely accepted and generally known practice is entirely a creation of its own imagination, without the slightest support in the record. Finally, as noted previously, TWA was not aware of the illegal extra-record activity of the intervenors in this case and, in view of the above discussion, is clearly not chargeable with constructive notice thereof.

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* "Every agency shall separately state and currently publish in the Federal Register . . . statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available. . . . No person shall in any manner be required to resort to organization or procedure not so published."

III.

The illegal acts in this case are sufficient to vitiate the award.

Both the Board and American argue that the recent FCC television cases establish a standard of "venality or corrupt tampering with the adjudicatory process" as the minimum which a petitioner seeking vitiation of an administrative proceeding must show (Board Brief, pp. 24, 32; American Brief, p. 45). Apparently, the Board and American urge that any type of influence short of "venal and corrupt" is, while unfortunate, to be ignored since the parties involved have only "somewhat 'unclean hands'" (Board Brief, p. 32). Certainly such a contention should not be accepted by this court since it is entirely foreign to basic principles of fairness in administrative proceedings.

The court in *Sangamon Valley Television Corp.* v. *United States,* ____ App. D. C. ____, 294 F. 2d 742 (D. C. Cir. 1961), the F. C. C. case closest in point to this case, did not even mention a standard of venality or corruption. The court held that "a fresh start" was necessary under circumstances not dissimilar to those in this case. The activities of the principal "offender" in *Sangamon,* while of course different from those of Intervenors in this case, were of similar intent and import, namely, attempting to influence an administrative agency in an *ex parte* fashion. Merely because one party, such as American in this case, being more sophisticated, uses a circuitous route of influence through public officials and mass communications media, and another less subtle party distributes turkeys and writes letters directly to Commissioners does not mean these two "different" types of conduct are not equally in violation of basic fairness in administrative procedures.

Nor is the test applied in *WKAT, Inc.* v. *F. C. C.,* ____ App. D. C. ____, 296 F. 2d 375 (D. C. Cir. 1961) one of venality and corruption. The court stated in that case (at 383):

> "Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding."

There is, therefore, no test of venality or corruption for remedial action. Each case is judged on its own merits and, it is submitted, that the showing in this case of a completely organized high-pressure campaign instituted and persisted in by the Intervenors to bring pressure to bear upon the Board and influence its decision is more than ample justification for the relief requested.

Conclusion.

The orders under review should be reversed and the award to American set aside.

Respectfully submitted,

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Of Counsel.

May 31, 1962.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

- x
TRANS WORLD AIRLINES, INC. : No. 15415
Petitioner, : No.
-vs.- : United States Court of Appeals For the District of Columbia Circuit
CIVIL AERONAUTICS BOARD, :
Respondent. : FILED OCT 22 1959
- x Joseph W. Stewart
CLERK

PETITION OF TRANS WORLD AIRLINES, INC. FOR REVIEW OF ORDER OF THE CIVIL AERONAUTICS BOARD

To the Honorable Judges of the United States Court of Appeals for the District of Columbia Circuit:

Petitioner, Trans World Airlines, Inc. (TWA), respectfully shows:

1. Petitioner is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Delaware.

2. Petitioner is an air carrier engaged in the transportation of persons, property and mail by aircraft between various points, including San Francisco/Oakland and New York/Newark, pursuant to duly issued certificates of public convenience and necessity.

3. Petitioner seeks review of Order No. E-14412 of the Civil Aeronautics Board (hereinafter called the "Board") adopted by the Board on September 2, 1959, and certain orders and rulings preliminary thereto, in the proceeding entitled "New York-San

Francisco Nonstop Service Case". A copy of Order No. E-14412 is attached hereto as Exhibit A. This order purports to authorize American Airlines, Inc. (hereinafter called "American") to engage in air transportation of persons, property and mail without restriction between San Francisco/Oakland and New York/Newark.

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

4. The proceeding below involved an application by American for amendment of a certificate of public convenience and necessity to permit New York-San Francisco nonstop operations by that carrier.* Upon motion of American the Board severed its application from a broader proposal and accorded the application preferred hearing.

5. The proceeding was paralleled by a series of ex parte communications between various persons and the Board, extending in time from the filing of American's motion for severance and immediate hearing until after the case was submitted for final decision following oral argument. These communications bore upon virtually every issue in the proceeding. Included among the communications was an ex parte oral argument addressed to the Board by a party to the proceeding.

6. Although the Bureau of Air Operations,

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* A similar application by Northwest was denied.

a division of the Board's staff, participated as a party, petitioner was denied access to a report bearing directly upon the issues in the proceeding prepared by the Bureau at the direction of the Board. Subsequently, the position of the Bureau, which was adverse to petitioner, was in large part adopted in the Examiner's Initial Decision.

7. The Board's final decision represents an adoption of the Examiner's Initial Decision, which failed to pass upon numerous issues of fact, law and policy raised by petitioner.

8. The basic issue in the proceeding was resolved by the vote of a member of the Board who had not heard oral argument.

FACTS UPON WHICH VENUE IS BASED

9. This petition is filed pursuant to Section 1006 of the Civil Aeronautics Act of 1938, 52 Stat. 1024, 49 U.S.C. §646 (hereinafter called the "Act")* and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. §1009.

10. Section 1006 of the Act provides that orders issued by the Board shall be subject to review by the United States Court of Appeals for the District of Columbia on petition filed within sixty days after the entry of such order by any person disclosing a substantial interest therein. A similar method and manner

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* By the terms of the Federal Aviation Act of 1958 the Civil Aeronautics Act of 1938 continues to govern proceedings pending at the time the successor Act went into effect. There is no relevant distinction between the two acts.

of review is provided for in Section 10 of the Administrative Procedure Act.

11. Petitioner has a substantial interest in the Board's order with respect to which review is sought. Since petitioner provides air transportation of persons, property and mail between San Francisco/Oakland and New York/Newark, the Board's order authorizing American to provide air transportation without restriction between these points will have a direct, adverse effect upon petitioner.

THE GROUNDS ON WHICH RELIEF IS SOUGHT

12. The grounds on which petitioner seeks relief are as follows:

A. Petitioner was denied the due process of law to which it was entitled under the Act, the Administrative Procedure Act and the Constitution of the United States in the following respects:

(1) The fact that, throughout this proceeding the Board was subjected to and participated in ex parte communications and contacts with persons supporting the applications for additional service, many, if not all, of which communications were authored, inspired or solicited by parties adverse to petitioner, violated petitioner's right to a fair hearing.

(2) Due process was denied petitioner by the fact that the Board substantially and, prejudicially to petitioner, violated its own rules by:

(a) participating in the ex parte communications referred to above;

(b) allowing, on American's contested motion for an immediate hearing, one of the parties to the proceeding to present ex parte oral argument in support of American's motion and application;

(c) receiving evidence and argument in support of American's application after the close of the record.

(3) Petitioner's right to a fair hearing was further violated by the fact that it was denied access to a report prepared by a division of the Board's staff which thereafter participated in the proceeding as a party, which report bore directly upon the issues in the proceeding.

(4) The fact that, under the circumstances here present, a member of the Board participated in the Board's decision and cast the deciding vote against petitioner without having heard oral argument denied petitioner due process.

(5) The fact that the Board refused to reopen the record to receive evidence of marked changes in circumstances resulting from the introduction of operations with jet aircraft denied petitioner a fair hearing.

B. The Board's order does not contain adequate findings supported by substantial evidence, particularly in view of the fact that the Board adopted and relied upon, as authority for its conclusions on particular issues, a fatally deficient Examiner's Initial Decision.

C. The Board has failed to apply the standards of Section 401 of the Act, in that in determining the requirements of public convenience and necessity the Board (1) erroneously assumed that the additional service proposed by American is required in spite of its own wholly inconsistent findings that such additional service would otherwise be provided by the existing carriers; and (2) failed to weigh the fact that the service provided by American in the New York-San Francisco market would be at the expense of other markets served by that carrier.

WHEREFORE petitioner respectfully prays that this Court review the said Order No. E-14412 of the Board and the orders and rulings preliminary thereto, and upon such review vacate said order and remand the case to the Board for further proceedings by the Board in conformity with the decision of this Court; and that, unless the Board determines to deny the applications, the Board be instructed to hold, with the aid of a special hearing examiner, an evidentiary hearing to determine the facts as to ex parte activity and its effect upon the qualifications of the applicants and the members of the Board preliminary to a rehearing of the other issues; and that petitioner have such other,

further and different relief as to this Court may seem just and proper.

Respectfully submitted,

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UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

E-14412

DOCKET NO. 9214 ET AL.

NEW YORK-SAN FRANCISCO NONSTOP SERVICE CASE

Decided: September 2, 1959

Certificate of American Airlines, Inc., for route No. 4 amended by removing restriction prohibiting nonstop service between San Francisco/Oakland and New York/Newark.

Application of Northwest Airlines, Inc., for nonstop rights between these points denied.

Authorization of a third unrestricted carrier between New York and San Francisco found warranted where record shows past air service failed to fully meet traffic needs of this major transcontinental market and where available traffic potential is sufficient to support multiple carrier service. Found that the use of jet aircraft with their greater speed, comfort, and convenience, will have a substantial impact on traffic growth in long-haul transcontinental markets such as New York-San Francisco.

Benefits to the traveling public of a fully competitive service in a market of the size and economic importance of New York-San Francisco outweigh diversion of revenue which TWA and United will suffer; traffic growth in market should go far to offset traffic lost to American. In any event, probable diversion from TWA and United will not impair their financial health or their ability to provide certificated services.

Major consideration compelling selection of American over Northwest to provide needed additional nonstop service in this market is fact that American is already in the market as a restricted carrier and is now and has for years been a substantial participant in the New York-San Francisco traffic to be served, and it already has an established identity in the market which can be readily harnessed to stimulate the new nonstop service. On the other hand, Northwest has never been certificated to serve San Francisco, and for all practical purposes is a complete newcomer to the New York-San Francisco market.

While need for better competitive balance and carrier strengthening are significant elements to be considered in carrier selection favoring Northwest, they are not controlling, and must be weighed in the balance along with other relevant factors; here element of carrier balance is

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

E-14412

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While need for better competitive balance and carrier strengthening are significant elements to be considered in carrier selection favoring Northwest, they are not controlling, and must be weighed in the balance along with other relevant factors; here element of carrier balance in terms of economic strength not found of sufficient weight to require ousting American from a market in which it has long been an established carrier and has a significant stake in the terminal-to-terminal traffic to be served.

APPEARANCES:

Same as in Initial Decision, and in addition:

Howard C. Westwood for American Airlines, Inc.
H. Templeton Brown for United Air Lines, Inc.

OPINION

BY THE BOARD:

In this consolidated proceeding American Airlines, Inc. (American), and Northwest Airlines, Inc. (Northwest), are seeking authority to provide nonstop service between San Francisco/Oakland and New York/Newark in addition to that provided by United Air Lines, Inc. (United), and Trans World Airlines, Inc. (TWA).[1]

After due notice, a public hearing was held before Examiner Walter W. Bryan. Thereafter he issued his Initial Decision in which he recommended the authorization of American as a third unrestricted carrier in the New York-San Francisco market, and denial of Northwest's application.

Exceptions to the Initial Decision and briefs to the Board have been filed by various parties.[2] The Board has heard oral argument and the case now stands submitted for decision.

Upon consideration of the record and the arguments advanced on briefs and in oral argument, we find that we are in agreement with the recommendations of the Examiner. Accordingly, we adopt as our own, except as modified herein, the findings, conclusions, and recommendations of the Examiner in his Initial Decision which is attached hereto as Appendix A.

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[1] The reference New York-San Francisco throughout this opinion will be understood to mean New York/Newark-San Francisco/Oakland.

[2] Exceptions and briefs were filed by American, Northwest, TWA, and United. The City and County of San Francisco filed a brief in support of the Initial Decision. The San Francisco Chamber of Commerce, the Port of New York Authority, and the Port of Oakland and the Oakland Chamber of Commerce filed statements in lieu of briefs.

The record developed in this proceeding amply supports the Examiner's conclusion that the public convenience and necessity require the authorization of a third nonstop carrier between New York and San Francisco. The Examiner found that the New York-San Francisco market is one of our foremost air traffic markets and that in terms of passengers and passenger miles, it is the largest long-haul market in the United States with only two nonstop carriers. He observed that the traffic generating ability of this market, which he found accounted for about 250,000 passengers and over 650 million passenger-miles in 1957, surpassed many other city pairs where three or more unrestricted carriers had been authorized. He noted the tremendous growth and economic strength and the industrial and commercial importance of both New York and San Francisco and the evidence indicating their continued rapid growth and development. He found that New York and San Francisco with a combined population of sixteen and one-half million people, are substantial contributors to air commerce, and are equally dependent upon air transportation since they not only serve as major gateways for foreign and overseas travel and as important recreational and vacation centers, but are two of the top air traffic generating cities in the United States, ranking first and fifth, respectively.

Yet he found that the air service available for this major transcontinental market in the past had not matched its economic importance or reasonable traffic needs or that provided in comparable markets. He noted, for example, the limited nonstop schedules which had been provided; the small number of coach seats available in comparison to the number of through coach-passengers in this market;[3] the unduly high load factors enjoyed by TWA and United on nonstop flights during most of 1957;[4] and the inconveniences caused by the inability to obtain the desired space and departure time on nonstop flights during peak months in 1957.

The record evidence as to the size and importance and continuing growth of the terminals and the strong community of interest existing between them, plus the data indicating that the use of jets over this long-haul segment would have a substantial stimulating impact on the already large traffic exchange between New York and San Francisco led the Examiner to conclude that New York-San Francisco would continue to be one of our top air travel markets. He estimated that the traffic volume in 1960 should be at least 44% more than in 1957, so that about 1,000 passengers a day would then be available to the New York-San Francisco nonstop carriers.[5] He pointed out that at least 25 other markets of lesser demand and potential had been authorized to receive three-carrier service and concluded that the sizeable potential of the New York-San Francisco market was sufficient, with proper scheduling and vigorous promotion, to support the services of three nonstop carriers even with the substantially increased capacity to be available with jet aircraft.

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[3] See Initial Decision, p. 28.

[4] The Examiner found that the load factor on coach flights during the first half of 1957 averaged around 80%, and during July and September of that year the average load factor was about 90%. He concluded that load factors around or over 80% for the entire year of 1957 clearly reflected the inability of passengers to secure space during peak periods.

[5] The Examiner concluded that the market would continue to expand by at least a 10% annual rate of growth and that an additional 10% increase in traffic in 1960 would result from the stimulus of the proposed jet nonstop service. Applying these factors to the Examiner's estimated 1957 nonstop potential of 250,000 passengers produces a total of about 366,000 passengers in the 1960 nonstop market.

Based on the above considerations, the Examiner concluded that the New York-San Francisco market clearly warranted the benefits of vigorous competitive service and that an additional nonstop carrier was required to assure the provision of the type and quantity of service to which this market was entitled and to provide the necessary competitive spur to develop the market beyond that accomplished by the existing carriers. Although recognizing that a sizeable amount of diversion would thus be inflicted on TWA and United, he found that the public benefits accruing from the new authorization outweighed the diversionary impact it would have on these carriers.

We are in accord with these findings and conclusions of the Examiner which are amply supported by the record in this proceeding and are more fully detailed in his Initial Decision. Accordingly we will not rehearse the evidence supporting the need for a third nonstop carrier, but we will address ourselves to particular exceptions warranting comment.

1. In their exceptions and briefs, TWA and United lay great emphasis on the fact that four years ago, the Board affirmatively found in the *Denver Ser ice Case*[6] that an additional nonstop carrier was not required. However, we do not find that this fact precludes our reaching a contrary conclusion on th record. The size and rate of growth and future potential as well as the mark change in the character of the transportation demands of this market since

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[6] *Denver Service Case*, Order No. E-9735, dated November 14, 1955.

we last considered its air service needs in 1955 have convinced us, as they did the Examiner, that three unrestricted transcontinental carriers are now required to properly serve its present and future needs. At the time of the Denver Service Case, the nonstop travelers did not constitute the major part of the through traffic, the nonstop market was just being developed, and grant of a one-stop service to American, which was an improvement of its former less direct routing, could provide an effective competitive transcontinental service.

However, following the Denver Service Case, with more long-range equipment available, the character of the market began to change with a far greater demand by the terminal-to-terminal passenger for nonstop service, thus reducing the effectiveness, from a competitive viewpoint, of the restricted carrier. Now with still newer technological developments bringing about even more dramatic changes in the Bay Area-New York air travel,[7] the trend to nonstops, as the Examiner found, will accelerate at a still greater pace. In the face of this development, differences in the route structure of the restricted and unrestricted carriers in the market are more pronounced, leaving American, whose New York-San Francisco authority requires a stop at Chicago, even less able to carry out its role as an effective third transcontinental carrier between the Bay Area and New York. Thus, despite protestations to the contrary, the award of nonstop rights to American constitutes another adjustment in the carrier's route structure necessitated by still further technological advances in trunkline equipment in order to

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7/ See Initial Decision, pp. 9-13, for a summary of the characteristics of the 707 jet which is proposed for use in this market.

permit continuation of the benefits of a third transcontinental service between San Francisco and New York.[8]

2. The Examiner estimated that an annual volume of about 366,000 passengers, or approximately 1,000 passengers a day, could reasonably be expected to move via nonstop flights between New York and San Francisco by 1960.[9] TWA and United have challenged this forecast as overly optimistic on the ground that the Examiner employed inflated historic data, overestimated the normal growth which could reasonably be expected in the market, and failed to exclude excursion fare traffic. We are not persuaded by these contentions.

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[8] As the record clearly shows, American has been an active participant in, and a promoter of, Bay Area-New York air traffic for more than twenty years. Although American could not serve the Bay Area directly prior to May 1947, the carrier nevertheless accounted for 25.8% of the Bay Area-New York passenger-miles in 1940. As TWA and United increased their through-service between New York and San Francisco/Oakland after World War II, American's passenger-mile participation declined to 16.4% in September 1946 and to 13.8% in March 1947. In May 1947, American was authorized to serve the Bay Area directly (West Coast Case, 8 C.A.B. 14 (1947)), thus permitting through-service by American between San Francisco and New York, although subject to a one-stop at Tulsa, Dallas, or another point in the Southwest. Thereafter, the carrier's Bay Area-New York passenger-mile participation increased from 13.8% in March 1947 to 19.5% in September 1947 and 22.0% in 1948. American's share subsequently declined to 11.8% in 1953 as United and TWA increased their San Francisco-New York service over the more direct Chicago routing. Followin its inauguration of DC-7 service in January 1954, American's passenger-mile participation again rose to 26.3% in March 1954. After the carrier's equipmen advantage had been overcome by TWA and United and they were able to provide direct nonstop Bay Area-New York service, American's passenger-mile participation over its more circuitous routing dropped to 16.3% in September 1954 and to 13.0% in September 1955. Again, American's New York-San Francisco route structure was updated in the Denver Service Case, supra, so as to give the carrier a more direct one-stop routing via Chicago. American's passenger-mile participation thereafter rose slightly to 15% by September 1956. However, as the trend to nonstop service in this market accelerated, American's participation declined to 11.1% in September 1957. (Exs. AA-4 and 6.)

[9] See footnote 5, page 3, supra.

In developing his forecast on the basis of historic data, the Examiner annualized the number of single-carrier local and connecting passengers moving between New York and San Francisco as shown in the Board's Traffic Surveys for 1957 as his base period. TWA and United attempted to cast doubt upon the accuracy of the Board's 1957 Traffic Survey figures insofar as they relate to New York-San Francisco traffic. It was pointed out that the Traffic Surveys prior to September 1958, based as they are on ticket sales, included many passengers moving between New York and San Francisco as common-fare passengers. Prior to the tariff change in April 1958, a traveler could buy a ticket in New York for either Los Angeles or San Francisco at the same fare. He could then go to either San Francisco or Los Angeles and make a stopover at either point, but the ticket was counted as two New York-San Francisco one-way tickets. Thus, it was claimed, the Board's Traffic Surveys in 1957 overestimated the New York-San Francisco market and underestimated the New York-Los Angeles market.

After comparison of the flow traffic data submitted by American, TWA, and United for two special survey periods in 1957, the Examiner found such a relatively small variation between the single-carrier O&D and connecting passengers as shown in the Board's Traffic Surveys for 1957, and the data furnished by the carriers, that he concluded that this single-carrier traffic reasonably reflected the nonstop potential between New York and San Francisco. We have examined the base period estimates of TWA and United as they appear in the record and find that the Examiner's conclusions in this regard were sound.[10] We also agree with his refusal to exclude from the base period data the excursion fare traffic. We also believe that the excursion fare travelers should be attracted to the greater speed, comfort, and convenience of jet aircraft with its dual configuration of coach and first-class seats, since we are not prepared to assume that excursion fares will not be available in the future as a traffic stimulant.[11] Accordingly, we reject the claim that the historic traffic data used by the Examiner were inflated.

We also find no merit in the attacks upon the 10% annual growth factor used by the Examiner. The O&D Traffic Surveys for 1952 through 1957 show an average annual growth rate in this market in excess of 12% and nearly a 50% increase is shown for the three-year period between 1954 and 1957. TWA and United contend that the growth trend in this market is declining; that the 1958 volume was even less than the 1957 level; and that no basis exists for assuming a 10% annual growth factor in the face of these facts. But we are not inclined to base our determination as to the future needs and potential of this market on a showing of traffic decreases for such a short period of time, particularly when the traffic drop was largely experienced during a period when a general business recession was being felt throughout the country and affected traffic in nearly all markets.[12] We have noted the fact that the 1958 volume did not show a 10% increase over 1957. However, in predicting a normal 10% annual growth, it is not expected, nor does the Board's forecast so indicate, that the growth within each year will be the same, but only that it will average 10%. Obviously traffic growth in any market cannot be expected to follow a straight line and rarely does. In the present case, we estimated that the normal traffic growth in this market for the three-year period (1957-1960) will amount to 33% with an additional 10% to reflect jet stimulation in the market in 1960. The fact that the 1958 volume did not show a 10% increase over the 1957 volume does not invalidate our forecast or preclude the attainment of the 1960 volume of traffic we anticipate.

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[10] As a matter of fact, United's 1957 base period estimate of 248,482 potential nonstop passengers in this market (Ex. U-110) is so close to the Examiner's estimate of 250,000 passengers for 1957 as to further support our conclusion that the Examiner's base period estimate is reasonable.

[11] It is noted that United included excursion fare traffic in its base period estimate. (Ex U-110 - p.2.) The record also shows that both TWA and United plan to drastically reduce their intermediate stop flights with piston aircraft between New York and San Francisco, indicating the small volume of excursion fare traffic they expect will move between these terminals on a single-carrier through-plane basis.

We are not persuaded that the long-continued growth of the New York-San Francisco market has ended. Indeed, we think the indications are favorable for greatly increased travel in this market. In addition to a 10% annual growth factor, the Examiner employed a 10% jet stimulation factor for 1960 to reflect the impact of jet aircraft on the market. TWA contends that the 10% jet stimulation factor is too high and that no more than a 5% factor is warranted. We cannot agree. A 5% factor reflects the amount of jet stimulation which TWA has estimated for its system. However, the record clearly indicates that the greater speed and other inherent advantages of jet aircraft will be of greater benefit in extreme long-haul transcontinental markets than in short-hop markets. Thus, it would be reasonable to assume that greater impact on traffic growth from this type of service would be felt in markets like New York-San Francisco. Use of a system-wide factor here fails to reflect this difference. In addition to the Examiner, Bureau Counsel and all of the other carriers predicted jet stimulation at at least 10% which we believe is a more reasonable estimate than the 5% factor urged by TWA.[13]

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[12] Preliminary traffic data for the month of May 1959 show an increase in industry revenue-passenger miles of over 16% over May 1958.

3. Besides challenging the Examiner's estimate as to the amount of traffic which will be available, TWA and United dispute the economic feasibility of authorizing three jet nonstop carriers between New York and San Francisco. It is asserted that the segment is lacking in backup traffic support; that even the volume of local traffic forecast by the Examiner would not support three carriers on a profitable basis; and that the volume of daily terminal-to-terminal passengers which can reasonably be expected to move via jet nonstops in the future will be fully accommodated by the proposed schedules of the existing carriers. United contends that three carriers operating three daily round trips with jets providing substantially more capacity than the total number of nonstop travelers to be exchanged between New York and San Francisco, would experience load factors far below a breakeven level. United estimated that if a third unrestricted carrier is authorized, all three carriers would suffer substantial losses at least through 1965, and that these losses would wipe out any profit for United's system at existing fare levels through 1961, or at the very least would seriously impair its financial position; and that TWA's situation would be even worse.[14]

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[13] United forecast a 12% factor to reflect the impact of jets on market the length of New York-San Francisco.

[14] TWA did not similarly construct estimates as to its losses resulting from multiple carrier competition in this market but took the position that there was no reason to believe that it would be in any more favorable position than United.

We are not persuaded by these contentions. In the first place, United's estimates are based upon traffic forecasts which we have rejected. Secondly, United erroneously assumes that each carrier must operate a minimum of three daily round trips regardless of the available traffic. The crux of the scheduling problem turns on the question of whether, as United contends, a carrier must offer a minimum of three daily round trips in order to be a factor in the market. American disputes United's claim in this regard, and pointed out in its brief and on oral argument that a full pattern of service by each carrier, tailored to meet the available traffic would in 1964, consist of three daily round trips per carrier in the peak season, and two daily round trips in the off season.[15] We find American's position in this regard persuasive. So long as the competing carriers tailor their service to the needs of the available traffic, we see nothing inherent in the scheduling of jet aircraft to require more than two daily round trips per carrier in the off season.

Obviously, jet aircraft with their much greater capacity requiring a larger passenger load for their support, do not generally permit management as much schedule flexibility as is possible with piston aircraft, and it must be recognized that frequency of service will of necessity be much less in the jet than in the piston age. But that does not mean that adjustments in schedules to meet the demands of the market cannot be made or that management in its use of jet equipment, as contrasted with piston-aircraft, must rigidly follow a schedule pattern it has projected for the future, even though the traffic to which it may then have reasonable access is less than it previsouly anticipated. As the Board pointed out in its opinion in the Suspended Passenger Fare Increase Case,[16] where a carrier's preexisting plans for expansion of equipment and services are in conflict with route actions taken by the Board, the carrier must alter its plans in conformance with that action. That admonition is no less relevant today than it was then.

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[15] American had originally proposed three daily round trips throughout the year.

To some extent, the New York-San Francisco market affords greater flexibility for the scheduling of flights and for adjusting capacity to traffic volume than is presently possible with the DC-7's. Because the greater speed of the turbojet and the length of the segment will overcome the time barrier between the east and west coasts, a convenient midday departure from both coastal terminals will be possible for the first time, thus making available more hours during the day in which flights can be scheduled for the accommodation of the travelers. In addition, the seasonality in traffic moving over this segment permits further adjustment of schedules. In short, we are not convinced by United's argument as to the required method of operation for three carriers in this market. We see no reason why, during the initial period of operation, schedules should not be tailored to take advantage of the seasonal variation in the market. By so doing each carrier can have a well-rounded pattern of jet nonstop service - three daily round trips in the summer peak season and two in the off season or an average of 7.5 daily round trips over the entire year - and, with the traffic volume we expect in this market by 1960, operate at above breakeven load factors.[17] After that, normal traffic growth should soon permit operations by the three carriers on a more profitable basis, since all the carriers concede that the market will continue to grow. Ultimately, we fully expect the sizeable growth potential of this rich and important long-haul market will warrant the scheduling of additional frequencies by the three carriers.

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[16] Order No. E-11812, dated September 25, 1957.

[17] On an average of 7.5 daily round trips and assuming an average of 112 daily seats per flight and 1000 daily passengers, the average load factor would be about 59.5%. On the basis of the cost and revenue forecasts in the record, the breakeven load factor for the 707 jet was estimated to be about 54.3%.

4. TWA and United assert that their present San Francisco-New York nonstop services are more than adequate to meet the needs of the market; that the market already has the benefits of fully competitive service; that their proposed jet operations will more than satisfy the market's service needs; and that no additional nonstop carrier is required. They contend that TWA has carried at least 90% of its pro rata share of the market, and that this clearly refutes the Examiner's finding that TWA has failed to provide effective competition. They claim that the Examiner's finding of a need for an additional carrier was based on the past pattern of service during a brief period of equipment shortage, and that the Examiner's findings of past inadequacies of service are contradicted by the evidence showing a substantial number of empty seats on nonstop flights and user testimony as to the adequacy of TWA's and United's present nonstop New York-San Francisco service.

While it is true that TWA and United at the time of the hearing were providing a substantial volume of nonstop schedules, both coach and first-class, between New York and San Francisco, this pronounced improvement in service did not occur until after the question of the need of additional service had been raised by this proceeding. But the record clearly shows, as the Examiner found, that the past services provided by these carriers, although not legally inadequate within the meaning of the Act, did not fully meet the needs of the traveling public.[18/] As is more fully set forth in the Initial Decision, the record discloses that between September 1954 and March 1957, the number of nonstop flights scheduled by TWA and United remained essentially unchanged, despite a 44% increase in traffic; only a limited amount of first-class nonstop service was available; and the only nonstop coach service offered the New York-San Francisco traveler prior to May 1957 consisted of an eastbound combination first-class and coach flight operated by TWA.[19/] The evidence clearly shows that during and prior to 1957 it was difficult for the traveler to obtain his choice of schedule or departure time on nonstop coach flights during peak periods. In March 1956 a total of only 20 nonstop coach seats per day were scheduled although 225 one-carrier coach passengers per day moved in this market. A year later in March 1957, still only 546 nonstop coach seats per month were made available for the 3800 exclusive coach passengers traveling between New York and San Francisco during that month. Even after the sharp increase in nonstop schedules between New York and San Francisco subsequent to March 1957,[20/] load factors on nonstop flights during the summer of 1957 remained high.[20a/]

Despite the contentions of TWA and United to the contrary, we think the Examiner properly found that the New York-San Francisco market has not in

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[18/] The Board has often certificated new service because of the substantial benefits which would flow therefrom even though the existing service is not legally inadequate. (Southwest-Northeast Service Case, Order No. E-9758, dated November 21, 1955; Denver Service Case, Order No. E-9735, dated November 14, 1955; New York-Chicago Case, Order No. E-9537, dated September 1, 1955; Tucson Airport Authority, Order No. E-10487, dated July 27, 1956; New York-Florida Case, Order No. E-10645, dated September 28, 1956.)

[19/] The pattern of nonstop schedules offered by TWA and United in the New York-San Francisco market is set forth in Appendix 1 attached to the Initial Decision.

[20/] Between April 1957 and September 1957, TWA and United increased their daily nonstop flights in this market by 75%.

[20a/] We agree with the Examiner that the high load factors enjoyed by the existing carriers on their nonstop coach flights during the summer of 1957 clearly reflects the inability of passengers to secure space during peak periods.

the past received that type of vigorous competition which its size and economic strength warranted. As he pointed out, from the time when nonstop service was first inaugurated between New York and San Francisco, until the pendency of this proceeding, TWA never matched either the quantity or the quality of United's service. For example, for 67% of the above period of time TWA provided only 33% of the total nonstop service, and 25% of the time provided only 20% of the total. Moreover, its service was not comparable since its one nonstop flight was 6.7% slower eastbound and 16.7% slower westbound than United's DC-7's. The fact that prior to 1957 TWA's participation amounted to about 80 to 90% of United's, although providing only one nonstop flight as against United's four, does not in our opinion, refute the Examiner's finding that TWA was not a full-time vigorous competitor. On the contrary, such a disparity in service and participation should more likely be attributed to the lack of sufficient nonstop flights in the market to meet the demand and the fact that United provided no coach nonstops.

TWA and United have explained that the space problem on nonstops in the summer of 1957 was due to a lack of equipment and not to the pendency of the present proceeding. However, in view of the extremely large increase in nonstop schedules after the motions for early hearing in this proceeding had been filed, as contrasted to the limited number operated in this market for several years prior thereto, 21/ we do not believe the equipment shortage supplies the basic answer, although it may have contributed to the situation. Moreover, nonavailability of aircraft does not offer a sufficient reason for

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21/ In March 1957 a total of 5 nonstops were scheduled by the two carriers. By September 1957 the total number of nonstops had increased to 14.

the limited amount of nonstop coach service scheduled as contrasted with nonstop first-class service. In all the circumstances, we do not believe that the recent improvement in service affords a sufficient basis for denying this market the benefits of effective multicarrier competition in view of the previous long-standing scheduling practice of the existing carriers.

We are not unmindful of the fact that these carriers have indicated their plans to inaugurate a full pattern of jet nonstop service between New York and San Francisco in the near future, which would provide a substantial amount of additional capacity for the accommodation of the San Francisco-New York travelers. However, in our opinion, the needs of the traveling public between New York and San Francisco have not been fully met in the past and we do not believe it would be consistent with our statutory obligation under the Act and our decisions thereunder to maintain the status quo and rely on the assurance of the carriers that the huge-capacity jet will provide the competitive spur necessary to insure the service benefits to which we have found this market entitled. In our judgment, in providing for the future as well as the present needs of a rich market with the ultimate potential of San Francisco-New York, and one which should be substantially enhanced by the unique advantages of jet aircraft, the authorization of a third carrier holds the greatest prospect for the full development of that potential. The Board has previously expressed its views with respect to the benefits of competition on too many occasions to require repeating. The authorization of a third New York-San Francisco nonstop carrier here is consistent with those views and will afford comparable benefits in this market.

5. United and TWA stress the importance of the New York-San Francisco market to their financial well-being, and they contend that the sizeable

amount of diversion they will suffer if a third carrier is added will seriously affect their financial positions. It is pointed out that this market is United's most important, producing 7% of that carrier's total revenue passenger-miles in 1957, while it is TWA's second most important market. The carriers note the Examiner's finding that American in 1960 will realize almost $12,000,000 in gross revenues from this market and they contend that this diversion of revenues in the face of their declining earning positions and during the period of jet financing will be extremely damaging to their system operations.

Undoubtedly our decision herein will cause substantial diversion from these carriers, as the Examiner found. But we do not envisage any serious financial harm accruing from the authorization of a third unrestricted carrier in this rich market.[22/] As the Board pointed out in other cases,[23/] the loss of traffic to TWA and United should, to a large extent, be compensated by the growth of the traffic in the market, thus tending to sustain the revenue of these carriers despite a reduction in their percentage participation in the New York-San Francisco traffic. Based on the forecast of 366,000

[22/] It should be noted, however, that the $12 million dollar estimated diversion refers to gross revenues and clearly does not mean that the carrier's profits will be affected in that amount. Moreover, rather than being faced with declining earnings, TWA's and United's net income for the twelve-month period ending April 30, 1959, showed a sizeable 245.4% and a 110.1% increase, respectively, over their net income for the corresponding twelve-month period in 1958 (Forms 41).

[23/] See for example Great Lakes-Southeast Service Case, Order No.E-13211, dated November 28, 1958.

nonstop passengers in the market in 1960, this increase in the market over that experienced in 1957 would mean that United and TWA would still experience a gross increase in passenger revenues of $1,120,585 and $1,009,096, respectively, in 1960 over their 1957 revenues (See Appendix B).

Naturally, the impact of diversion on the carriers already in a market is considered before additional service is authorized. But, unless the diversion will result in a serious economic weakening of a carrier, it is not a sufficient public interest factor to justify denying the public a needed new service.[24] In assessing the impact of probable diversion here, it must be recognized that we are dealing with one of the top revenue producing segments in the country, with two of our largest carriers, and that a large segment of the traveling public is affected by our decision. In weighing the advantages to the public against the injury to the carriers, we find that the present and long-range benefits of the additional service being authorized outweigh the effect which such service may have on TWA and United. We are unable to find that the probable diversion resulting from our decision to permit American to provide nonstop in addition to its one-stop service will impair the financial health of either carrier or either carrier's ability to provide certificated services.

Fears of diversion and estimates of substantial losses such as are asserted here, have a familiar ring as they are interposed by the existing carriers in the market in every new route proceeding coming before us. Yet the same carriers who are concerned about diversion in their own markets continue to press for the need for additional competition in markets in which they are not authorized to operate. Despite the addition of a substantial amount of new competitive service in many markets during the past several years, the aviation industry has continued to grow and prosper and the number of passengers being transported by the air transport industry has increased year by year. We have no reason to believe any different result will occur in this market from our decision herein.

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[24] *Great Lakes-Southeast Service Case*, *supra*.

6. TWA and United also argue that the record is devoid of any reliable data based on actual operating experience of turbine aircraft, and that it is impossible to ascertain with any degree of accuracy the impact of high-speed, huge-capacity jets on traffic, schedules, fares, load factors, or costs. Absent such data, they assert, the Board cannot intelligently predict the feasibility of three-carrier nonstop competition in the jet age in the New York-San Francisco market, nor can the Board's stated purpose of using this case as a "test tube" to form the basis for a study on the economics of jet operations for future proceedings be attained. Under these circumstances, the carriers insist, decision must be deferred until more tangible evidence with respect to the actual performance, traffic stimulation, and costs of jet service is available; and that since jet equipment is already in use such data could be obtained without any unreasonable delay or undue prejudice to any party to the proceeding. 24a/

24a/ It is claimed that the present proceeding was instituted "out-of-turn" contrary to the usual priority of filing practice of the Board in setting applications down for hearing. Similar allegations were previously considered by the Board in its Order of April 9, 1958 (Order No. E-12337), wherein the Board rejected the allegation of procedural error in setting this case down for early hearing. Nothing has been presented at this time which would warrant the Board to reach a different conclusion nor has any showing been made that TWA and United were prejudiced by the action of the Board in this regard. As we stated previously, while the Board customarily assigns applications in the order of filing, (footnote continued on next page)

We recognize that precise accuracy in determining cost estimates of a turbine aircraft, which for the purposes of this record, is as yet unused, is unattainable. While we agree with United and TWA that it might be preferable if data based on actual operating experience of jet aircraft were in the record, we do not believe its absence is fatal or requires us to delay authorizing a service we have found required. Extensive exhibits and a great deal of testimony covering every conceivable aspect of jet operations, including performance characteristics of the 707 aircraft, the impact of jet operations on passenger traffic and routings, the effect on cargo movements in this market, and the relative costs of jet and piston-engine operations as related to this market are in the record. While admittedly American's cost estimates are based on the manufacturer's performance estimates and specifications and not on actual operating experience, it is conceded that the 707 is the most extensively tested aircraft introduced into commercial aviation. The Board must necessarily rely upon estimates as to future conditions, and has customarily done so, both as to costs and traffic. There is no reason to treat the estimates as to jet operations any differently here. Even if we deferred our decision for a reasonable period in order to obtain later data based on actual operating experience with jet equipment, we are not persuaded that such data necessarily covering only a relatively short operating period, would provide any materially different or more reliable information with respect to economics of turbojet service than we now have

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24a/ (footnote continued) a priority-of-filing policy seldom has a chance to operate and numerous exceptions have been made where in the Board's opinion circumstances justify such action. No provision of the Act or rule of the Board specifically spells out the order in which the Board shall hear its cases. The policy to be followed in the disposition of its docket is left largely to the discretion of the Board so as to enable it to properly administer the Act in accordance with the public interest. Our reasons for assigning this case for early hearing are adequately stated in our previous orders, and for the reasons expressed therein the Board is convinced that expediting the proceeding was fully warranted and that in this case blind observance of the priority of filing practice would not have been in the public interest.

available before us.

The fact of the matter is that the record in this case on the basic elements of public convenience and necessity, including the effect of the introduction of jet aircraft on the route, is as thorough and complete as one could reasonably expect. The stakes in the case have been high, and the parties have thoroughly litigated the issues both on the evidentiary level and the policy level. In our judgment, further hearing in this case would achieve little more than insulating, at least for a time, the existing participants in the market from the effects of a new competitor. We think the public is entitled to a decision on the merits of this case now, and that it would be wasteful and unfair to prolong these proceedings in the quest for certainty as to what the future will be.[25/]

7. We turn now to the selection of carrier. While we agree with the Examiner's selection of American over Northwest, we do so for somewhat different reasons. In giving comparative consideration to the proposals of the two applicants, we are satisfied that, insofar as service to the public is concerned, either American or Northwest could provide the service we have found required and compete effectively with the existing carriers in this market. Despite American's superiority to Northwest in terms of basic economic strength, we have no doubts as to Northwest's capacity for rendering first-rate competitive service in such a major trunkline market. And for these reasons, while American would have some equipment advantage over Northwest in terms of the earlier availability of jets, that factor has no influence

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[25/] For the above stated reasons, we will deny United's motion to reopen the record.

on our choice of carrier.

In selecting American over Northwest to provide the service in question, our choice is predicated primarily upon the fact that American is now and has for years been a substantial participant in the New York-San Francisco market. As pointed out by American, its passenger-mile participation in this market from 1940 to 1957 has averaged approximately 17% (AA. Ex. 4). As the record shows, in March 1954, American's passenger-mile participation amounted to more than 26%, due to its earlier delivery of DC-7's and ability to provide faster service. After the equipment advantage American enjoyed had been overcome by United and TWA, American's passenger-mile participation in 1957 was still 11% or around some 80 million revenue passenger-miles.[26] For the year ended June 30, 1958, American also carried 39.5% of the combination carrier freight ton-miles between New York and San Francisco (Ex. TWA-104).

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[26] It is argued that American's claim of a large stake in the New York-San Francisco market is substantially overstated since its estimate of market participation includes passengers which it carried only part of the way between San Francisco and New York. The assertion is made that only the single-carrier traffic carried by American between these terminals should be relied on to support its participation claim since this is the only traffic which can be considered as nonstop potential. We find this argument unconvincing. Adoption of such a theory would be inconsistent with our treatment of the participation or historic interest factor in other cases. Passengers using American in the course of a two-carrier trip between New York and San Francisco are as much evidence as passengers using a one-stop single-carrier service that American's participation in the traffic to be served is greater than Northwest's and that its historic stake in the traffic moving between the terminals has been significant. Carriers normally relate their claim of historic interest to the passengers which they carry by connection during a two-carrier journey between two terminals.

In sharp contrast to American's historic interest, Northwest has never been certificated to serve San Francisco, and for all practical purposes is a complete newcomer to the New York-San Francisco market. Whereas American maintains a substantial sales force as well as a maintenance force at San Francisco (to support its existing services to many points on its system), Northwest would be obliged to expend considerable sums of money to inaugurate service in this market. As the Examiner noted, it would be necessary for Northwest to establish large terminal facilities at San Francisco for its jet operations as well as ticket offices and would require a considerable expenditure in promotional campaigns to acquaint the public with its service. The simple fact is that American already has an established identity in the San Francisco-New York market, which can be readily harnessed to stimulate the new nonstop service.

Operationally, of course, the proposed new service would integrate to a far greater extent with American's present system. Since it serves San Francisco on other routings, American would be in a better position, from an equipment and scheduling standpoint, to meet departure times and to provide extra capacity to satisfy peak demands when needed. On the other hand, Northwest, whose transcontinental route extends from the east coast to Seattle some 500 miles to the north of San Francisco, and with no present service out of San Francisco, would have less operational flexibility.

Contrary to its claims, Northwest has failed to demonstrate that it can offer greater public benefits than can American if it were awarded the route. While Northwest has urged that it has a superior record in promoting low fare coach service, we are unable to find that Northwest will offer any greater prospect for effective coach service than American in this market. American's proposed schedules, with mixed configuration aircraft, give as much promise as Northwest's for improved coach service.

Much has been said in this proceeding regarding the Denver Service Case, and the established Board policy favoring the strengthening of smaller carriers in order to achieve a better competitive balance. Northwest has relied heavily upon this policy in attempting to persuade us as to the merits of its application. But the prior decisions of this Board make it clear that considerations of competitive balance and carrier strengthening, while significant, are not controlling, and must be weighed in the balance along with other relevant factors.[27]

As previously noted, this Board has consistently recognized historic interest in a market as a factor of importance in carrier selection, and where as here the historic interest is as sizeable and as long standing as American's, we are impelled to give it great weight.[28] We know of no case where we have allowed the factor of competitive balance to override so substantial an historic interest in a market as American has shown here. And, we can find no sound justification on this record for ousting American from the New York-San Francisco market merely to achieve a better carrier balance in terms of economic strength.

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[27] St. Louis-Southeast Service Case, Order No. E-13026, dated September 30, 1958.

[28] "*** in choosing among competing applicants to serve a given market, a carrier already participating in the market on a restricted basis enjoys some advantage over a completely fresh applicant *** the carrier with a historic interest in the market already has some stake in the market and is entitled to some special consideration in the light thereof." (Eastern Route Consolidation Case, Order No.E-11184, dated April 1, 1957.) Cf. Chicago-Milwaukee-Twin Cities Case, Order No. E-13890, dated May 19, 1959.

It is true that in the Denver Service Case, the Board expressed concern, in terms of competitive balance, over the award to American of a Chicago-San Francisco route that gave the carrier a one-stop New York-San Francisco service. But the fact remains that the Board granted American this improved New York-San Francisco authorization, and the carrier has relied upon it in developing its share of this market. Since permitting American to provide nonstop in addition to its present one-stop service will amply meet the needs we have found required, we believe it would be anomalous at this late date to inject Northwest as the fourth carrier between New York and San Francisco and maintain restrictions on American, which is already a substantial participant and an established carrier in the terminal-to-terminal traffic to be served.

We have given due consideration to all of the exceptions to the Initial Decision and find that they should not alter our decision herein.

Accordingly, on the basis of the foregoing and all the facts of record we find:

1. That the public convenience and necessity require the amendment of the certificate of American Airlines for route No. 4 so as to eliminate therefrom the restriction against the provision of a nonstop service between San Francisco or Oakland, Calif., on the one hand, and New York, N. Y., or Newark, N. J., on the other hand.

2. That American is fit, willing, and able to perform such transportation properly and to conform to the provisions of the Act and the rules, regulations, and requirements of the Board thereunder.

3. That the motion to reopen the record filed herein by United Air Lines should be denied.

4. That, except as indicated above, all applications herein should be denied.

An appropriate order will be entered.

Gurney, Vice Chairman, Minetti and Hector, Members of the Board, concurred in the above opinion. Durfee, Chairman, and Denny, Member, filed the attached joint dissenting opinion.

DURFEE, CHAIRMAN, AND DENNY, MEMBER, DISSENTING:

We strongly disagree with today's decision in this case.

The record is not ripe for a Board decision since it contains no evidence of the economic and operational impact of the introduction of jet aircraft - the prime and stated purpose of the Board in hearing this case out of its normal order. Further, the record is devoid of any evidence of a public need for the additional competition authorized; the volume of traffic forecast by the Board is insufficient, on the basis of the Board's findings of fact, to economically support three non-stop carriers; and the diversion that will be suffered by the existing carriers, on the basis of the Board's forecast, will seriously injure those carriers and, consequently, the air transportation system. In our opinion, on the record before us the Board has no alternative but to deny American's application or, in the alternative, remand the case to the Examiner for further hearings.

The stated basis for the Examiner's Initial Decision, adopted by the majority, is that the addition of a third non-stop carrier is required in order to improve the existing service. However, since there is little, if any, evidence of a need for additional service, and because the existing service is more than adequate, it becomes apparent that the majority opinion is based upon a theory of competition for competition's sake. The authorization of duplicating service based upon the foregoing theory is completely contrary to Board precedent and policy. Under the Act, the Board is adjured to consider as being in the public interest competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the commercial, postal and defense needs of the nation, and to foster sound economic conditions in such transportation. The foregoing has never been considered by the Board, at least in recent years, to be a mandate for the authorization of competition merely for the sake of having competition.

On the contrary, the Board has not in the past authorized three or more carrier competition unless the evidence showed that the existing service was clearly inadequate, or that there was a pressing public need for an additional carrier. Neither of these factors is present herein. There is absolutely no evidence that during any period of time the existing service has been clearly inadequate. Furthermore, there is no dispute that the present service, since mid-1957, is more than adequate. Additionally, no finding can be made that the proposed service of United and TWA will not be fully adequate.

The Board in this case has not made a finding of inadequacy of service. The most the majority implies is that for a short period of time, due to equipment shortages, the service was marginally adequate. Very significantly, the majority fails to support its decision by any Board precedent. Insofar as we can determine, the Board has never authorized a third competitive carrier based upon the type of evidence that has been presented in this case.

1. The public convenience and necessity do not require a third non-stop carrier.

The record contains no substantial evidence which would support a finding that there is either a need for a third non-stop carrier or that the public would be adversely affected if a third non-stop carrier were not certificated at this time. Both the Examiner and the majority agree that the existing service is adequate as to quality and quantity.

The majority conceded that from mid-1957 the existing carriers have provided a substantial volume of non-stop schedules, both coach and first-class, between New York and San Francisco. In addition, the record clearly shows that these flights have been operated at relatively low load factors.

The record, then, is clear that the service since mid-1957 has been highly adequate. Moreover, the majority was unable to specifically conclude that there was inadequate service in this market during any past period of time. The very worst that the majority was able to state with respect to service in this market was that prior to mid-1957, non-stop coach service between the two cities, although legally adequate, did not fully meet the needs of the public since the load factors were relatively high. During this short period of time, however, the record is clear that first-class non-stop service was more than adequate.

Contrary to the majority, the evidence shows that prior to mid-1957, and during the transition period when United and TWA were acquiring new equipment, both carriers provided 212 non-stop coach seats per day and 477 coach seats per day on one-stop schedules. The fact that more first-class non-stop seats were provided than coach seats during this period does not mean inadequate coach service. In fact, there is no evidence that at any time first-class passengers were denied non-stop seats, and no evidence that any coach passengers were denied seats on either non-stop flights or one-stop flights. The majority concluded that "non-availability of aircraft does not offer a sufficient reason for the limited amount of non-stop coach service scheduled." In our opinion, carriers should not be criticized or penalized for the number of coach seats provided vis-a-vis first-class seats during a short period of time when equipment shortages existed, so long as there is adequate service being provided coach passengers on either non-stop or one-stop flights.

Insofar as the existing service is concerned, the evidence shows that during the period July 1957 - August 1958, United had an average load factor of 65 per cent. For the period January 1957 - July 1958, TWA's first-class non-stop load factors have been well below 65 per cent, except for the month of May 1958. Significantly, in August 1958, TWA's all-coach flight departing from San Francisco at 10:15 A.M., operated during the entire month at an average load factor of 35 per cent.

The witnesses for San Francisco conceded that they were not either criticizing the services of TWA and United, nor alleging inadequate service, per se. The Examiner did not find that the evidence submitted by San Francisco showed inadequate service. San Francisco's primary argument was not inadequacy of service, but that Los Angeles had three non-stop carriers. Obviously, the fact that Los Angeles has three non-stop carriers has no bearing on the New York-San Francisco situation. Los Angeles is the largest West Coast city, and the only one with three-carrier competitive service to New York. It is also the fastest growing city, and by no economic measurement can San Francisco be considered comparable to Los Angeles. Significantly, the majority opinion makes no attempt to justify the third nonstop carrier between New York and San Francisco on the basis that New York-Los Angeles has three non-stop carriers.

The majority, in an attempt to support the argument of "service that did not fully meet the needs of the public," stated that the existing carriers failed to increase the number of New York-San Francisco non-stops until mid-1957, when it was apparent that the Board would institute the present proceeding. The record is crystal clear as to the reasons that TWA and United did not increase the number of New York-San Francisco non-stops prior to mid-1957. Although the majority mentions the TWA and United equipment shortage, no attempt was made to analyze the problem, particularly with respect to the delivery dates of the new equipment. Both United and TWA placed orders for additional DC-7's and Lockheeds in early 1955, but deliveries for United did not begin until the first quarter of 1957, and for TWA, until mid-1957. The fact that a carrier does not receive equipment until 2½ years after it has been ordered certainly does not mean that the carrier is not willing or able to furnish adequate service. Certainly the Board should not penalize or criticize a carrier because it has adopted a prudent and conservative policy toward the purchase of new equipment. During that period in which United and TWA were unable to inaugurate additional New York-San Francisco non-stops due to equipment shortages, both carriers were nevertheless operating a frequent and well-rounded pattern of service in the market, both non-stop and one-stop. As shown by the following table, the service was highly adequate:

UNITED'S AND TWA'S SAN FRANCISCO-NEW YORK NON-STOP AND ONE-STOP FREQUENCIES
(1957)

	Non-stop	One-stop	Total
January	5	11	16
March	5	11	16
May	8	9	17
July	10	7	17
September	14	4	18
November	13	4	17

The majority also concluded that additional competition is needed in this market because it has not in the past received the type of vigorous competition to which it is entitled. The evidence does not support the foregoing conclusion. Both United and TWA have for a long period of time competed vigorously for the traffic. As shown by the Air Traffic Surveys, these carriers have provided effective competition for each other. In 1953, TWA out-carried United, and during the period 1954-1957, the division was roughly 55 per cent - 45 per cent in favor of United. The passengers carried on through-plane service in the 1957 survey periods split 52.5 per cent United, versus 47.5 per cent TWA, but in March 1958, TWA again out-carried United by a small margin. The foregoing data clearly shows vigorous and effective competition between these two carriers.

The allegation of the Examiner and the majority that three-carrier competition is needed in this market to insure such alleged benefits of competition as (1) authorization of the most modern equipment; (2) increased coach service; and (3) improved quality and quantity of service, cannot be supported. Insofar as the first allegation, it is undisputed that United and TWA will provide the most modern jet-type aircraft over this route, and the certification of a third carrier will not improve the type or quality of equipment to be operated.

As to the question of coach service, the existing carriers are presently operating a greater number of daily unused non-stop coach seats than first-class seats. TWA and United have historically and still do provide a far greater proportion of their services at coach fares than does American, and there is no reason to expect American to provide any additional spur on this score. There is no basis for the Examiner's finding, adopted by the majority, that TWA and United are providing just the minimum standard of service contemplated by Section 404(a) of the Act, in view of the undisputed fact that in July 1958, there were 324 empty New York-San Francisco non-stop seats operated.

With respect to the allegation that there will be an improved quality and quantity of service, we find that this also cannot be supported. In fact, it is our opinion that the certification of a third carrier will not contribute in any way to the quality and quantity of the existing service. According to American's exhibits and testimony, it will establish competitive schedules with those of United and TWA. There are only three periods during the day that represent convenient departure times - morning, noon and evening.

All three carriers will have to establish competitive schedules at those times. The third carrier will offer nothing but additional space which, based on the present and forecast traffic volume is not needed.

An additional carrier would provide no greater convenience, superior equipment, or even different schedules. The principal result, rather than improving the standard of increase, will be an increase in the volume of service at the three peak demand periods during the day, an increase in volume which is not necessary and will only result in lower load factors for each carrier. Therefore, since volume of service is the principal result rather than an over-all improvement in the standard of service, the establishment of a third carrier is not justified.

Even if we assume that during a limited past period, service may have been only marginally adequate, that assumption, per se, cannot be used as a reason to establish three-carrier nonstop competition where there has been an adequate explanation for the short-term deficiencies. Never before has this Board found service to be inadequate on so slim a reed as the experience during a four or five-month period of one year where service has admittedly been adequate both before and after. Never before has this Board placed such a premium, in evaluating adequacy of service, on the failure of carriers to introduce new nonstop equipment as soon as its competitors. The Board does not attempt to meet the explanations offered by United and TWA, but nevertheless the implications of the Board's decision are clear: Every carrier must gain first place on the production lines for new equipment; the lag between new equipment orders and deliveries is no excuse for not providing service with the latest equipment types in use in the industry. Clearly such overemphasis on the ability of carriers to meet short-run traffic demands in an industry where lead time on new equipment can be up to five years is unsound, and if this policy is to be followed in future route cases, it will encourage premature and uneconomic equipment decisions.

The majority reaches a contrary conclusion to the Denver Service Case as to the need for a third nonstop carrier in this market. In that case the Board found that the public convenience and necessity did not require a third nonstop carrier between New York and San Francisco, and placed an affirmative restriction in the certificate granted to American. The primary purpose of the restriction was to preclude American from providing competitive nonstop service. The Board found that this was necessary in order to preserve the competitive balance in the transcontinental field. There is nothing in this record to show that there has been any change in the need for preserving the existing competitive balance in this market. In fact, the desirability of maintaining such balance is stronger now than at the time of the Denver Service Case, due to the inauguration of jet aircraft.

2. The New York-San Francisco market will not economically support three nonstop carriers.

Simple arithmetic applied to the Board's forecast traffic, and in view of the carrier's capacity forecast, conclusively shows that the decision herein is uneconomic and contrary to the public interest.

The Board has forecast 365,000 nonstop passengers for 1960, or 1,000 per day. All the applicants, including American, proposed three round trips per day, which with 112-seat Boeing 707's would provide 2,016 seats daily in the market.[1] This would result in an average annual

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[1] The record shows that 2,124 daily seats would actually be operated in view of TWA's proposed 120-seat Boeing configuration and United's proposed 122-seat DC-8 configuration. In addition, United proposed a fourth daily jet one-stop schedule for 1960, to be operated as a nonstop in 1961.

load factor of 49.6 per cent, a load factor which is highly uneconomic, according to the Board's own findings. Even if it is assumed that the 10 per cent annual growth forecast by the Board would continue beyond 1960, it would be 1961 before the three carriers could even approach the hypothetical and unrealistic breakeven load factor of 54.3 per cent adopted by the majority. Consequently, all three carriers will suffer substantial losses at the very time profits will be needed for the completion of the jet transition, and on a segment that is of vital importance to the financial well-being of the carriers presently serving the market.2/ Significantly, the Examiner found that three-carrier competition would result in serious depressed load factors through 1960, and Bureau Counsel concluded that the route would not be operated at a profit until sometime after 1960.

American belatedly recognized on Brief to the Board and oral argument that the operation of this route by three non-stop carriers would be highly uneconomic and therefore advanced a new argument. American proposed that all three carriers reduce schedules during the winter season from three round trips per day to two. Aside from the fact that this proposal is directly contrary to the forecasts of record,3/ and aside from the fact that it would be competitively untenable

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2/ New York-San Francisco is United's most important route segment from a revenue producing standpoint, and TWA's second most important route.

3/ Witnesses for American as well as TWA and United testified that the minimum schedule pattern to meet the convenience of the travelling public in this market requires three round trips a day, with departures morning, noon and evening. Significantly, San Francisco specifically stated that three round trip schedules were needed, morning, mid-day and evening by each carrier. In fact San Francisco selected American to provide the service over Northwest for the primary reason that American had proposed three round trips per day on an annual basis.

for the carriers to reduce schedules when the market demands schedules during three distinct daily periods, American's proposal is inherently adverse to the public interest. Simply stated, American proposes that the travelling public should receive inferior service during six months of the year for the sole purpose of accommodating American in the market.

The majority not only adopts American's argument, but in addition adjures the carriers to limit their schedules as American proposes. This is the first time to our knowledge that the Board has not only forecast an inferior public service in adding new competition, but sounded a warning to the carriers that is intended to assure that inferior service will result.

Despite the majority's warnings, it is virtually inevitable that all three carriers will provide three round trips per day on an annual basis. As hereinbefore shown, the minimum schedule pattern, in order to meet the convenience of the public, is three round trips per day. Even this pattern represents a substantial decline in the departure choices available to the public during recent years. The public will demand convenient service, and the very competition which the Board is introducing here as a spur to provide additional service will compel the provision of the service. None of the carriers, least of all American, will be able to avoid scheduling a minimum of three flights without sacrificing its share of and identity in the market.

This matter of scheduling illustrates in the clearest terms our position on the lack of need, or lack of proof of need, for a third carrier. It is not disputed that two carriers can and will provide schedules which will carry the traffic, and the load factor data derived from the majority's figures so shows. United and TWA will provide schedules that will meet the schedule timing needs of the traveling public, and they will do so at a profitable, yet reasonable, load factor (69 per cent) on the basis of the majority's 1960 traffic forecast. The certification of a third carrier will inevitably result in unprofitable operations for all three, or, in the alternative, the public will be severely inconvenienced by the decrease in frequency. The public gains nothing in the way of improved service at any time aside from additional empty seats which must inevitably be paid for with higher fares. There is no improvement in quality of service, timing of schedules, improved aircraft, or any other service factor.

We reiterate that the foregoing observations are predicated on the Board's own findings and conclusions, not on different facts. In addition, moreover, we have considerable difficulty with the findings of fact.

The traffic and diversion forecasts are inherently erroneous. The 365,000 annual passengers forecast by the majority assumes a 10 per cent "normal growth" per year from 1957 to 1960. The majority concedes that 1958 traffic shows a decline from 1957.[4] Experience, therefore, has already seriously weakened the majority's forecast. Perhaps in future years the forecast growth rate will be realized, but the significant fact is that in light of 1958 results, traffic will not reach 365,000 passengers in 1960 unless the growth rate is considerably higher than the majority has forecast. The majority's decision, therefore, has no rationale support. This again is simple arithmetic based on facts which are contained in the Board's decision, but which the Board overlooks. The Board tries to explain why there was no growth in 1958, but still assumes in its forecast of 1960 traffic and its forecast of diversion (see Appendix B), that the growth actually took place. This error is compounded by assuming a 10 per cent 1958 growth in computing the 1959 and 1960 growth forecast and further compounded by applying the jet stimulation factor of 10 per cent to the erroneous 1960 forecast.[5]

On the basis of the majority's growth forecast rates, and assuming the 1958 traffic was the same as 1957, the 1960 traffic would be only 332,750 annually, or 884 passengers per day. On this basis, TWA and United alone would average only a 61 per cent load factor. If a third carrier were added, their average load factors would be a disastrous 42 per cent; and even if all carriers cut back schedules as proposed by American, average load factors would be a losing 50 per cent.

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[4] See the majority opinion, pp 7-8

[5] These inherent errors are further compounded by the use of CAB O&D Survey data as a base, that includes Los Angeles traffic and also international traffic that now moves direct to destination via international carriers.

In light of the foregoing, without regard to what the growth will actually be, it is apparent that the majority's decision is based on patently erroneous findings.

We have little doubt that overall traffic growth will return to a more normal trend now that the recession has clearly ended, although there is no basis on this record for assuming that the rate of growth will return to pre-1958 levels, particularly for long-haul markets like New York-San Francisco. Similarly, we believe that jet service will stimulate new traffic, but in the absence of more concrete evidence, which this case was intended to, but did not, elicit, we think there is a strong basis for questioning whether the long-haul domestic market such as New York-San Francisco will realize increases as significant as the majority assumes.

In a situation like the present one, when the record is inadequate, where strong and vigorous competition admittedly exists, where the alleged temporary deficiency in past service was so relatively insignificant, where the new carrier will provide no new service and therefore not stimulate any new traffic, and where the stakes involved for the future of the carriers and their ability to continue providing an effective and economical service are so critical, we think a conservative approach is required by the public interest. In our opinion, it would be more realistic to forecast 1960 traffic by assuming no growth for 1958, and 8 to 12 per cent growth for 1959 over 1957 (recognizing that 1958 was abnormally depressed), and a 7 to 10 per cent growth for 1960, together with a 5 to 10 per cent jet stimulation factor for

1960. The resulting range (from 303,000 to 339,000) leaves room for differences in judgment, but not even at the top of the range could three carriers be economically supported. If the more conservative approach we suggest were taken, in light of all the circumstances, the market would be marginal for even two carriers to provide a satisfactory year-round pattern of jet schedules.

3. There is no reliable evidence with respect to the impact of turbine aircraft in this market.

The record is fatally deficient, since it contains no reliable evidence with respect to the operating and economic impact of jet aircraft in this market. Therefore, it is impossible for the Board to intelligently determine the effect of high-speed, huge-capacity jet aircraft on traffic, schedules, fares, load factors, and costs. The majority was forced to concede that the record was deficient in this respect, stating, "While we agree with United and TWA that it may be preferable if data based on actual operating experience of jet aircraft were in the record, we do not believe its absence is fatal, or requires us to delay authorizing a service we have found required." The majority then concluded, "The fact of the matter is that the record in this case, on the basic elements of public convenience and necessity,**** is as thorough and complete as one could possibly seek." The foregoing conclusion is erroneous. The basic elements of public convenience and necessity as applied to this case are not present. In the first place, this is not the ordinary new route proceeding, since if it had been, it would not have been set down for expedited hearing. This case was given an expedited hearing primarily to enable the Board to determine whether the public convenience and necessity required a third nonstop carrier in the New York-San Francisco market if all carriers were operating turbine aircraft. If it had not been for the imminent inauguration of jet service, this proceeding would have taken its normal place on the Board's docket. Recently, in the Denver Service Case, the Board concluded that the public convenience and necessity did not require a third nonstop carrier. Therefore, in order to reverse the Denver Service Case, the Board must make an affirmative finding that the public convenience and necessity requires an additional nonstop carrier because of the inauguration of jet service. Such a finding cannot be made because of the serious lack of evidence with respect to the operating and economic characteristics of jet aircraft.

It is clear from Board Order No. E-12103, January 13, 1958, that it was the Board's primary intention, in prematurely setting this case for hearing, to establish "A full-scale investigation of the imminent impact of the operation of jet aircraft in a market of the size and importance of that involved here." The Board further stated:

> "It is expected, therefore, that the applicants and intervening carriers will give careful consideration in their exhibits in this case to the effects of their planned operation of jet aircraft in this market, and we direct the Examiner to make specific findings on this issue, in determining whether the public convenience and necessity requires additional nonstop service in the market in question." (Emphasis added).

Therefore, without the specific findings of the effect of jet operations in this market, and the Examiner and the majority made none that are supported by evidence, the public convenience and necessity for the service cannot be determined. The only findings made by the Examiner on this issue were that jets had a huge carrying capacity, and that they might stimulate traffic as much as 10 per cent. These are not sufficient findings to support the ultimate conclusion that an additional jet nonstop carrier is required.

In order for the Board to determine whether the public convenience and necessity require a third nonstop carrier operating jet aircraft, it would be necessary, under the ground rules of this proceeding, for the Board to make specific findings based on the actual operating experience of jet aircraft as to the costs of operating such aircraft, the breakeven load factor,[6] the type of scheduling required, and the percentage that jet aircraft will or will not stimulate traffic. Because of the transition to jets, and the substantial differences in terms of speed, capacity, and their effect on maintenance, flight patterns, traffic, and the training of crews, both flight and ground, there is no way of arriving at any precise determination of costs, breakeven load factors, or traffic stimulation without actual experience. The evidence in this record will not permit such a determination, and it does not, therefore, give the Board the opportunity to critically study and analyze the impact of jet aircraft with respect to the issue of public convenience and necessity.

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[6] The majority adopts a breakeven load factor for the Boeing 707 of 54 per cent, which was suggested by the manufacturer. There is no estimated breakeven load factor for the Douglas DC-8 in the record. In any event, a manufacturer's breakeven load factor has never been considered reliable by either the carriers or the Board.

In April 1959, several of the carriers, in response to a request by the Board, submitted their views as to the many problems facing the industry with the inauguration of jet aircraft. All of the parties, without exception, unanimously agreed that there was insufficient experience to arrive at any definite conclusions with respect to the operation of jet aircraft. The following constitutes some of the specific comments made by the air carriers:

AMERICAN AIRLINES

"The foreseeable future of jet operations will be a time in which the carriers should be allowed to acquire experience and adjust to their experience by pricing experimentation."

UNITED AIR LINES

"United wishes to stress that only after the period of transition to jet operations will reliable data begin to become available on the economics of jet operations. Until such time, extreme caution must be exercised to avoid actions which may lead to permanent injury to the economic soundness of the industry."

TRANS WORLD AIRLINES

"A substantial period of transition lies ahead: Some carrier must be first with jets, some carrier must be last. With the interlaced network of competitive routes existing, the early recipients of jets will benefit at the expense of their competitors with later delivery dates. It will be a period of severe stress for a substantial part of the industry.

"There are many elements of jet operations for which costs are in excess of those anticipated. Whether jet operations will later produce economies that will offset these higher costs is at least uncertain and unlikely to be resolved in the transition period."

NORTHWEST AIRLINES

"Of critical significance * * * * will be the transition period covering the inauguration and subsequent broadening of the base of commercial jet air service. This period, which will encompass the remainder of 1959 and at least all of 1960, will be most difficult with respect to proper determination of jet fares because of:

1. The absence of sufficient experience by which to determine actual normal operating costs of wholly new aircraft types -

2. The unknown factor of traffic response to a broader pattern of jet services then exists at the present time -

3. The unknown impact of turbo-jet services upon the remaining turbo-prop and piston engine services of the carriers - "

BRANIFF AIRWAYS

"We respectfully request that the Board use care in applying the limited actual jet experience which is available to prospective conditions throughout the industry, and particularly to Braniff. There is reason to believe that jet costs will increase substantially as operating stage lengths are reduced, and that present passenger enthusiasm will wane as jet service is expanded to additional markets."

DELTA AIR LINES

"It now seems clear that the initial period of pure jet operations will be more costly than later periods as a result of the following factors:

1. Aircraft utilization will be lower in the initial period;

2. Ground facilities and equipment necessary for jet operations will receive relatively less use, and therefore result in higher unit costs, in the early period of jet operations;

3. Pre-operating costs will be greater for jet aircraft than for any other new type of equipment previously placed in service by Delta, and amortization of these pre-operating charges in accordance with established practice will produce additional charges against operations in the early years of jet operations; and

4. Delta will also be faced with the high costs of a 'learning period' operation during which all personnel, especially in flight operations, maintenance, overhaul and stations, must develop new skills."

CONTINENTAL AIR LINES

"The transition that the airline industry is facing is of such a nature that we cannot predict with any degree of preciseness what cost problems will be encountered in the foreseeable future. The tremendous differences in terms of speed, capacity, and their effect on maintenance, flight patterns, training of crews and ground personnel, preclude arriving at precise estimates of costs without practical experience."

In addition, the Board realizing the tremendous operating and economic problems associated with the inauguration of jet operations, instituted on September 5, 1958 a broad study of the probable effects of the industry's acquisition of jet aircraft on the Board's economic regulatory program. The purpose of this study is to enable the Board to develop an insight into the probable effects of conversion to jet aircraft, to aid the Board in planning and carrying out an effective economic regulatory program related to the development of the jet operations. The principal elements of the study are to be (1) forecasts of traffic volume and related revenues; (2) estimates of unit operating costs; (3) evaluation of the prospects of the carriers for percentage subsidy-free operations under the revenue and cost conditions anticipated; and (4) study of actions the Board might take concerning route structures, fares, classes of service, etc., to facilitate the development of profitable jet operations. This study has not been completed, and until it has been, the Board should not now authorize additional competition over competitive routes where the competing carriers have definite plans to operate jet equipment. The existing carriers should be given the opportunity to inaugurate their jet flights without excessive competition.[7]

4. Diversion would be substantial and unwarranted.

The majority apparently are not concerned with the substantial amount of revenues that will be actually diverted from United and TWA, an amount conceded to be by all parties approximately $12,000,000.[8] This is substantial diversion, per se. It represents over three per cent of TWA's 1958 domestic passenger revenues and two per cent of United's, the largest percentage diversion ever involved in a new route award between only one pair of cities. Diversion in this amount and its effect cannot be ignored by the Board.

Diversion is always an important element of the public convenience and necessity, and must be carefully weighed by the Board in determining whether a new service is justified. Substantial diversion becomes a deciding factor when it adversely affects the financial well-being of existing carriers or when there is a lack of public need for the proposed duplicating service. Such diversion is of overwhelming significance where, as here, contrary to the pattern of most Board decisions authorizing additional competition, a stronger carrier is being certificated into markets of weaker carriers. It is our opinion that since there is a lack of public need for the proposed service and no public injury if the proposed service is not authorized, that diversion in this amount is sufficient to outweigh any alleged benefits. As hereinbefore shown, all the evidence conclusively shows that the existing carriers are now providing, and will continue to provide, more than adequate service in the New York-San Francisco market.

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[7] Dissent, Great Lakes-Southeast Service Case, Docket No. 2396, decided September 30, 1958

[8] The $12,000,000 majority diversion estimate assumes that American will capture only 30 per cent of the market. This conclusion is not supported. Even American forecast that it would capture a larger share of the market. On the basis of New York-Los Angeles experience, we think American will capture more than 33 per cent of the market.

Additionally, and most important, the majority fails to discuss the possible effect that diversion, in the amount of $12,000,000, will have upon passenger fares. The Board, in the General Passenger Fare Investigation, Docket 8008, must determine whether there should be an increase in fares over the level in existence on February 9, 1958. If the evidence in that case indicates that fares should be increased, the amount of the increase will depend upon the earning prospects of the industry. If a third nonstop carrier is authorized between New York and San Francisco, industry profits will be reduced by up to $12,000,000, and this reduction will be compensated in the form of increased fare levels for which the public gets little or nothing in return.

In conclusion, based upon this record, we would not authorize a third nonstop carrier between New York and San Francisco at this time. Instead, we would deny the applications for such service, or, in the alternative, defer decision until such time as the Board has substantial, reliable and probative evidence of the economic and operating effects of jet aircraft as specifically applied to this market.

/s/ JAMES R. DURFEE

/s/ HARMAR D. DENNY

APPENDIX A

DOCKET NO. 9214

THE EXAMINER'S INITIAL DECISION REFERRED TO HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION GIVEN AT THE TIME OF ITS RELEASE. THE INITIAL DECISION IS ATTACHED TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES IN THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

ESTIMATED DIVERSION IN NY-SFO MARKET FOR CALENDAR YEAR 1960

	American	United	Trans World	Total
A. (1) Passengers carried on through-plane services March 1-14 and Sept. 17-30, 1957 a/	730	9,662	8,715	19,107
% each carrier of total	3.8	50.6	45.6	
B. (1) Estimated 1957 non-stop potential (number of passengers) b/	9,500	126,500	114,000	250,000
C. (1) Estimated 1960 non-stop market (1957 X 133.1% X 110.0%) c/	-	-	-	366,025
(2) Distribution if American's application is denied d/	13,909	185,209	166,907	366,025
(3) Distribution if American's application is granted e/	109,808	134,770	121,447	366,025
D. (1) Diversion computation: Net change between C-2 & C-3	+95,899	-50,439	-45,460	-0-
Average yield per passenger between LGA and SFO f/	$135.50	$135.50	$135.50	
Gross passenger revenue change	+$12,994,315	-$6,834,485	-$6,159,830	-0-
(2) Growth-offset theory: Net change between B-1 and C-3	100,308	8,270	7,447	116,025
Gross increase in passenger revenue g/	$13,591,734	$1,120,585	$1,009,069	$15,721,388

a/ As shown in exhibit U-C of United and AA Response-14 of American. Trans World data obtained by a 14-day allocation of the number of passengers shown in TWA-35.

b/ This total allocated to each carrier by percentage distribution in "A" above.

c/ Increase of 10% per year to account for normal growth, plus a 10% increase to account for the traffic stimulus due to jet service.

d/ Assuming share of nonstop potential will remain the same as in 1957.

e/ Assuming American will obtain 30% of the nonstop potential and United and Trans World will divide the balance in accordance with their present ratio to each other.

f/ Average of coach and first-class fares.

g/ Net increase in passengers X $135.50.

Order No. E-14412

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 2nd day of September, 1959

In the matter of the

NEW YORK-SAN FRANCISCO
NONSTOP SERVICE CASE

Docket No. 9214 et al.

O R D E R

A public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That an amended certificate of public convenience and necessity in the form attached hereto be issued to American Airlines, Inc., for route No. 4.

2. That said amended certificate shall be signed on behalf of the Board by its Chairman, shall have affixed thereto the seal of the Board attested by the Secretary, and, subject to the extension of its effective date in accordance with the provisions of said amended certificate shall be effective on November 1, 1959.

3. That the motion to reopen the record filed herein by United Air Lines, Inc., be and it hereby is denied.

4. That, except to the extent granted herein, all applications in this proceeding be and they hereby are denied.

By the Civil Aeronautics Board:

/s/ Mabel McCart

Mabel McCart
Acting Secretary

(SEAL)

Issued pursuant to
Order No. E-14412

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

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CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended)

for Route No. 4

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AMERICAN AIRLINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the terminal point Los Angeles, Calif., the intermediate points San Diego, Calif., Phoenix, Tucson, and Douglas, Ariz., El Paso, Tex., and beyond El Paso, Tex., the intermediate points (a) Oklahoma City and Tulsa, Okla., and Nashville, Tenn., or (b) Midland-Odessa, (to be served through Midland Army Air Field), Big Spring, Abilene, Fort Worth, and Dallas, Tex., Texarkana and Little Rock, Ark., Memphis and Nashville, Tenn., and

   (a) beyond Nashville, Tenn., the intermediate points Louisville, Ky., and Cincinnati, Ohio, and (i) beyond Cincinnati, Ohio, the intermediate points Dayton, Columbus, and Akron, Ohio, and the terminal point Cleveland, Ohio, and (ii) beyond Cincinnati, Ohio, the intermediate points Columbus, Ohio, Pittsburgh, Pa., and the coterminal points New York, N. Y., and Newark, N. J.,

   (b) beyond Nashville, Tenn., the intermediate points Louisville, Ky., Cincinnati, Ohio, Huntington, Charleston-Dunbar, Parkersburg, Clarksburg, and Elkins, W. Va., Washington, D. C., Baltimore, Md., Wilmington, Del., Philadelphia, Pa., Newark, N. J., New York, N. Y., Bridgeport, New Haven, and Hartford, Conn.-Springfield, Mass., Providence, R. I., and the terminal point Boston, Mass.,

   (c) beyond Nashville, Tenn., the intermediate points Knoxville, Tenn., Bristol, Roanoke, Lynchburg, and Richmond, Va., Washington, D. C., Baltimore, Md., Wilmington, Del., Philadelphia, Pa., Newark, N. J., New York, N. Y., Bridgeport, New Haven, and Hartford, Conn.-Springfield, Mass., Providence, R. I., and the terminal point Boston, Mass.;

2. Between the coterminal points San Francisco and Oakland, Calif., the intermediate points Phoenix, Tucson, and Douglas, Ariz., El Paso, Tex., and beyond El Paso, Tex., the intermediate points (a) Oklahoma City and Tulsa, Okla., and Nashville, Tenn., or (b) Midland-Odessa (to be served through Midland Army Air Field), Big Spring, Abilene, Fort Worth, and Dallas, Tex., Texarkana and Little Rock, Ark., Memphis and Nashville, Tenn., and beyond Nashville, Tenn., as described in "1" (a), (b), and (c) above;

3. Between the terminal point Milwaukee, Wis., the intermediate points Chicago, Peoria, and Springfield, Ill., St. Louis, Springfield, and Joplin, Mo., Tulsa and Oklahoma City, Okla., Dallas, Fort Worth, Abilene, Big Spring, Midland-Odessa (to be served through Midland Army Air Field), and El Paso, Tex., Douglas, Tucson, and Phoenix, Ariz., and (a) beyond Phoenix, Ariz., the intermediate point San Diego, Calif., and the terminal point Los Angeles, Calif., and (b) beyond Phoenix Ariz., the coterminal points Oakland and San Francisco, Calif.;

4. Between the terminal point Houston, Tex., the intermediate points Nashville, Tenn., Columbus, Ohio, and Pittsburgh, Pa., and the coterminal points New York, N. Y., and Newark, N. J.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate; and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points prior to the effective date of this certificate. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein, other than a point required to be served through an airport named herein, through any airport convenient thereto, and

render scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby.

(3) The holder shall serve Milwaukee, Wis., only on flights originating or terminating at St. Louis, Mo., or a point west thereof.

(4) The holder shall serve San Diego, Calif., only on flights originating or terminating at Phoenix, Ariz., or a point east thereof.

(5) Except with respect to nonstop flights scheduled between San Francisco or Oakland, Calif., on the one hand, and New York, N. Y., or Newark, N. J., on the other hand, the holder shall serve San Francisco and Oakland, Calif., only on flights serving Dallas, Tex., Tulsa, Okla., or a point west of either thereof other than San Francisco or Oakland, Calif.

(6) The holder shall not render nonstop service (a) between Cincinnati, Ohio, and Philadelphia, Pa., and (b) between Charleston, W. Va., and Philadelphia, Pa., Newark, N. J., or New York, N. Y., and (c) between New York, N. Y., Newark, N. J., or Philadelphia, Pa., on the one hand, and Clarksburg, Elkins, Parkersburg, or Huntington, W. Va., on the other hand.

(7) Flights serving Dayton or Columbus, Ohio, on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve Nashville, Tenn.

(8) Flights serving Louisville, Ky., on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other hand, shall also serve (a) Nashville or Memphis, Tenn., or Dallas, Tex., or (b) Tulsa or Oklahoma City, Okla., and at least one additional intermediate point west of Tulsa.

(9) Flights serving Cincinnati, Ohio, on the one hand, and Phoenix, Ariz., Los Angeles, San Francisco, or Oakland, Calif., on the other, hand, shall also serve (a) Nashville or Memphis, Tenn., Dallas, Tex., or Chicago, Ill., or (b) Tulsa or Oklahoma City, Okla., and at least one additional intermediate point west of Tulsa.

(10) Flights serving Louisville, Ky., on the one hand, and Huntington and Charleston, W. Va., Washington, D. C., Baltimore, Md., or Wilmington, Del., on the other hand, shall also serve Cincinnati, Ohio.

(11) Flights serving Louisville, Ky., on the one hand, and Philadelphia, Pa., on the other hand, shall serve Cincinnati, Ohio, and one intermediate point between Cincinnati, Ohio, and Philadelphia, Pa.

(12) Flights serving Louisville, Ky., on the one hand, and New Haven and Hartford, Conn.-Springfield, Mass., Providence, R. I., and Boston, Mass., on the other hand, shall also serve both Cincinnati, Ohio, and one of the following points: Washington, D. C., Baltimore, Md., Wilmington, Del., Newark, N. J., or New York, N. Y.

(13) Flights serving Charleston, W. Va., on the one hand, and New Haven, Conn., Hartford, Conn.-Springfield, Mass., Providence, R. I., or Boston, Mass., on the other hand, shall also serve one of the following points: Washington, D. C., Baltimore, Md., Wilmington, Del., Newark, N. J., or New York, N. Y.

(14) Flights serving Nashville, Tenn., on the one hand, and Charleston, or Huntington, W. Va., on the other hand, shall also serve Cincinnati, Ohio.

(15) Notwithstanding the linear route description in this certificate, the holder may serve the coterminal points San Francisco and/or Oakland, Calif., on the one hand, and Phoenix, Ariz., and points east thereof, on the other hand, on flights carrying property and mail only, which also serve the intermediate points Los Angeles and/or San Diego, Calif.: Provided, That on such flights the holder shall not discharge at Los Angeles or San Diego property or mail which was enplaned in San Francisco or Oakland and shall not discharge at San Francisco or Oakland property or mail which was enplaned in San Diego or Los Angeles.

(16) The holder's authority to serve Huntington, W. Va., is suspended.

(17) The holder's authority to serve Texarkana, Ark., is suspended for the period during which Trans-Texas Airways is authorized to serve such point.

(18) Flights serving Houston, Tex., shall also serve Pittsburgh, Pa.

(19) Flights serving Pittsburgh, Pa., shall (a) also serve at least one of the following points: Memphis and Nashville, Tenn., Tulsa and Oklahoma City, Okla., Fort Worth, Dallas, and Houston, Tex., and (b) originate or terminate at (i) Tulsa, Okla., or Dallas, Tex., or a point west of either such point, or (ii) Houston, Tex.

(20) Flights serving Columbus, Ohio, on the one hand, and New York, N. Y., or Newark, N. J., on the other hand, shall also serve at least one of the following points: Memphis and Nashville, Tenn., Tulsa and Oklahoma City, Okla., Fort Worth, Dallas, and Houston, Tex.

The exercise of the privileges granted by this certificate shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

The authority in "(15)" above shall expire on August 11, 1954, or upon the date the temporary certificates of public convenience and necessity issued pursuant to the Board's Order Serial No. E-3085, dated July 29, 1949, otherwise cease to be effective, whichever shall first occur.[1]

This certificate shall be effective on November 1, 1959: Provided, however, That prior to the date on which this certificate would otherwise become effective the Board, either on its own initiative or upon the timely filing of a petition or petitions seeking reconsideration of the Board's order of September 2, 1959 (Order No. E-14412) insofar as such order authorizes the issuance of this certificate may by order or orders extend such effective date from time to time.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman, and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on the 2nd day of September, 1959.

/s/ James R. Durfee

Chairman

(SEAL)

ATTEST:

/s/ Mabel McCart

Acting Secretary

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[1] American Airlines, Inc., has filed an application on February 8, 1954, Docket No. 6541, for continuation of the authority in "(15)" above.